Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1476

J. W. BATESON COMPANY, INC., *et al.*, *Petitioners*

v.

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, *et al.*, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACK REPHAN
AND
RAYMOND R. DICKEY
1120 Connecticut Avenue, N.W.
Washington, D. C. 20036
Attorneys for Petitioners

Of Counsel:

DANZANSKY, DICKEY, TYDINGS,
QUINT & GORDON
1120 Connecticut Avenue, N.W.
Washington, D. C. 20036

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UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, *et al., Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, J. W. Bateson Company, Inc. and Centex Corporation, a Joint Venture, d/b/a J. W. Bateson Company, and The Aetna Casualty and Surety Company, American Re-Insurance Company, Employers Re-Insurance Corporation, General Reinsurance Corporation, and The Home Insurance Company, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on January 28, 1977.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra*, pp. 1a-6a) is reported at — F.2d —, — U.S. App. D.C. —.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on January 28, 1977. A timely petition for rehearing, or, in the alternative, for hearing *en banc*, was denied on February 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Whether union trustees, seeking recovery of unpaid fringe benefit funds and union dues, required to be withheld under a collective bargaining agreement from the wages of employees of a sub-subcontractor on a federal construction project, may sue to recover such monies under the Miller Act, 40 U.S.C. § 270a, *et seq.*, where neither the union trustees nor the employees of the sub-subcontractor have any direct contractual relationship with either the prime contractor or a subcontractor of the prime contractor.

2. Whether the Court of Appeals' decision, extending the coverage of the Miller Act to union trustees who have no contractual relationship with either the prime contractor or a subcontractor, which decision is in conflict with the decision of the Courts of Appeals for the First, Fourth, Fifth and Ninth Circuits, has misinterpreted this Court's opinions in *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.* and *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*

STATUTE INVOLVED

The Miller Act, 40 U.S.C. § 270b(a), as amended, provides:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

STATEMENT OF THE CASE

1. Material Facts

On or about August 10, 1971, petitioner, J. W. Bateson Company (hereinafter "Bateson"), entered into a written prime contract with the United States of America, acting by and through the General Services Administration, for the construction of an addition to the Howard University Hospital building in the District of Columbia.

On August 12, 1971, Bateson, in conjunction with the other named petitioner sureties, duly executed and delivered to the United States a payment bond (hereinafter "Miller Act bond") in accordance with the provisions of the Miller Act, 40 U.S.C. § 270a, *et seq.*, as amended, in the sum of $2,500,000.00, to protect the class of persons, within the contemplation of the statute, who furnish labor or materials for a government construction project.

Thereafter, Bateson entered into a subcontract with Pierce Associates, Inc. (hereinafter "Pierce"), which subcontract obligated Pierce to perform a portion of the work specified in the original contract between Bateson and the United States. Subsequently, Pierce entered into a sub-subcontract with Colquitt Sprinkler Company, Inc. (hereinafter "Colquitt") to provide the materials and labor required to install a sprinkler system in the addition to the Howard University Hospital.

Respondent, Road Sprinkler Fitters Local Union No. 669, U.A. (hereinafter "Local 669") is an unincorporated labor union representing sprinkler fitters employed by sprinkler contractors including Colquitt.

Respondents, Trustees of the National Automatic Sprinkler Industry Pension Fund, the National Auto-

matic Sprinkler Industry Welfare Fund and the National Automatic Sprinkler Local 669, U.A. Educational Fund (hereinafter "Trustees") are the trustees of the employee fringe benefit trust funds established by the Collective Bargaining Agreement (hereinafter "Agreement") between the National Automatic Sprinkler and Fire Control Association (hereinafter "Association"") and Local 669.

Colquitt is a party to the Agreement. However, Colquitt is not a member of the Association, therefore, it was necessary for Colquitt to separately sign the Agreement in order to be bound by its provisions.

This action involves claims against the Miller Act bond for unpaid fringe benefit contributions and moneys withheld from the wages of the employees of Colquitt during the period May 1, 1973 through December 1, 1973, while said employees were engaged in the installation of a fire sprinkler system at the Howard University Hospital project.

2. The Proceedings Below.

Respondents filed their complaint against petitioners in the United States District Court for the District of Columbia on May 9, 1974 (Civil Action No. 74-699). The basis for jurisdiction in the District Court action as set forth in the complaint was the Miller Act, 40 U.S.C. §§ 270a and 270b, as amended. In response to the complaint, the petitioners filed on May 23, 1974, a motion to dismiss the complaint for failure to state a claim, or, in the alternative, on the ground that the court lacked jurisdiction over the subject matter of the complaint. In their motion, petitioners maintained that respondents lacked standing to sue under the Miller Act, 40 U.S.C. § 270a, *et seq.*, because they had

no contractual relationship with either the prime contractor or with a subcontractor as required by 40 U.S.C. § 270b(a). Respondents filed their response to the motion on June 13, 1974, and petitioners filed a reply to respondent's response on June 18, 1974. On July 3, 1974, the District Court entered an order denying the motion to dismiss. In denying petitioners' motion, the District Court interpreted this Court's opinion in *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974) to require a holding that Colquitt was a "subcontractor" within the meaning of the Miller Act notwithstanding the fact that Colquitt was a third-tier subcontractor (sub-subcontractor) having no contractual relationship, direct or implied, with the prime contractor.

On July 15, 1974, petitioners filed a motion to reconsider the motion to dismiss, or, in the alternative, to certify the decision for interlocutory appeal. Respondents filed their response to petitioners' motion on July 23, 1974, and on July 26, 1974, the District Court denied petitioners' motion. On August 5, 1974, petitioners filed an answer to the complaint. Six months of discovery efforts by both parties thereafter ensued.

On February 18 1975, petitioners filed a motion for summary judgment, together with a supporting memorandum which set forth three separate grounds in support of the motion: (1) that respondents waived their right to file a claim on the Miller Act bond; (2) that respondents are estopped from filing a claim on the Miller Act bond; (3) that respondents lack standing to file a claim on the Miller Act bond because they had no direct contractual relationship with either the prime contractor or a subcontractor. On March 24,

1975, respondents filed a cross-motion for summary judgment along with two affidavits and a memorandum in support thereof and in opposition to petitioners' motion for summary judgment. Respondents requested the court to grant partial summary judgment with respect to petitioners' liability for the monies claimed. On April 7, 1975, petitioners filed a memorandum in opposition to respondents' cross-motion for summary judgment and on April 17, 1975, respondents filed a reply to petitioners' memorandum. Thereafter, on June 6, 1975, the District Court entered an order denying petitioners' motion for summary judgment and granting respondents' cross-motion for summary judgment.

On July 1, 1975, petitioners entered their notice of appeal to the United States Court of Appeals for the District of Columbia Circuit from the District Court's order dated June 6, 1975. On September 19, 1975, respondents filed in the Court of Appeals a motion to dismiss the appeal on the ground that the appeal was not within the jurisdiction of the court because the order from which the appeal was taken was neither a final judgment under 28 U.S.C. § 1291, nor an appealable interlocutory order under 28 U.S.C. § 1292, absent proper certification from the District Court. On October 24, 1975, the Court of Appeals entered an order dismissing the appeal Thereafter, the District Court certified its order dated June 6, 1975, for interlocutory appeal by order dated October 29, 1975. On November 4, 1975, petitioners entered their second notice of appeal and on December 10, 1975, the appeal was docketed by the Court of Appeals (No. 75-2199).

After briefs were filed by the parties, the case came up for oral argument before the Court of Appeals on December 9, 1976. On January 28, 1977, the Court of Appeals entered its opinion and judgment affirming the decision of the District Court (App., *infra* pp. 1-). Petitioners thereafter filed a timely petition for rehearing, or, in the alternative for hearing *en banc*, which was denied on February 17, 1977.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals for the District of Columbia Circuit Is Contrary to the Holdings of the Courts of Appeals for the First, Fourth, Fifth and Ninth Circuits and Other District Courts.

The United States Court of Appeals for the First, Fourth, Fifth and Ninth Circuits [1] have all held that a third tier subcontractor (respondents in this case) is too remote to be entitled to recover on a Miller Act bond.

Except for the holding of one District Court, [2] which holding was expressly rejected by the First, Fifth, and

[1] *United States ex rel. Powers Regulator Co.* v. *Hartford Accident and Indemnity Co.*, 376 F.2d 811 (1st Cir. 1967); *United States ex rel. W. J. Halloran Steel Erection Co.* v. *Frederick Raff Co.*, 271 F.2d 415 (1st Cir. 1959); *United States ex rel. DuKane Corporation* v. *United States Fidelity & Guaranty Co.*, 422 F.2d 597 (4th Cir. 1970); *Elmer* v. *United States Fidelity & Guaranty Co.*, 275 F.2d 89 (5th Cir. 1960), *cert.* denied, 363 U.S. 843 (1960) *Fidelity and Deposit Co. of Maryland* v. *Harris*, 360 F.2d 402 (9th Cir. 1966).

[2] *McGregor Architectural Iron Co.* v. *Merritt-Chapman & Scott Corp.*, 150 F.Supp. 323 (D.Pa. 1957).

Ninth Circuits, [3] and by other District Courts, [4] the decision of the Court of Appeals for the District of Columbia Circuit stands alone. Interestingly enough, the holding of the District of Columbia Circuit that Colquitt was a "subcontractor" rather than a sub-contractor is even inconsistent with an earlier decision of that Court decided under the District of Columbia mechanics' lien law. [5]

Because of the conflict between the decision in the instant case and the decisions of the First, Fourth, Fifth and Ninth Circuits, and because of the significance and importance of this case to thousands of Government construction contractors on projects involving hundreds of millions of dollars, the writ should be granted. See Rule 19 of the Rules of this Court.

2. The Court of Appeals Misinterpreted the Decisions of This Court.

All of the decisions of the various Courts of Appeals and District Courts cited herein as being contrary to the holding of the Court of Appeals for the District of Columbia Circuit, relied upon this Court's decision in *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102 (1944).

[3] *United States ex rel. W. J. Halloran Steel Erection Co.* v. *Raff, supra; Elmer* v. *United States Fidelity & Guaranty Co., supra; Fidelity and Deposit Co. of Maryland* v. *Harris, supra.*

[4] *United States ex rel. Newport News Shipbuilding and Dry Dock Co.* v. *Blount Bro. Constr. Co.*, 168 F.Supp. 407, 411 (D.Md. 1958), *United States ex rel. Jonathan Handy Co., Inc.* v. *Deschenes Constr. Co.*, 188 F.Supp. 270, 272 (D. Mass. 1960); *United States ex rel. Whitmore Oxygen Co.* v. *Idaho Crane & Rigging Co.*, 193 F.Supp. 802, 803 (D. Idaho 1961).

[5] *Battista* v. *Horton*, 128 F.2d 29, 31 (D.C. Cir. 1942).

The issue in *MacEvoy* was whether under the Miller Act a person supplying materials to a materialman of a prime contractor can sue under the Miller Act. This Court held that he cannot. In fact, this Court said in *MacEvoy* that the right to sue on a Miller Act bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give statutory notice of their claim to the prime contractor. 322 U.S. at 107-108. This Court said further that:

> "To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso [of 40 U.S.C. § 270b(a)] and to the expressed will of the framers of the Act. Moreover, it would lead to the absurd result of requiring notice from persons in direct contractual relationship with a subcontractor but not from more remote claimants." 322 U.S. at 108.

The limitation recognized by this Court in *MacEvoy* was reaffirmed by this Court in *F.D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*, *supra*, where this Court said:

> "The rights afforded by the act are limited, however, by the proviso of § 270(a). In [*MacEvoy*] this Court construed § 270b(a) to limit protection of a Miller Act bond to those who had a contractual agreement with the prime contractor or with a 'subcontractor'. Those in more remote relationships, including persons supplying labor or material to a mere materialman, were found not to be protected." 417 U.S. at 122.

In *Rich*, the prime contractor, F. D. Rich Co., had a direct contractual relationship with Cerpac Co. to supply and install certain millwork and exterior plywood. Cerpac, in turn, ordered its requirements for exterior plywood from Industrial Lumber Co. The issue was whether Cerpac was a "subcontractor" for the purposes of the Miller Act or a mere materialman. This Court applied the "functional" definition of "subcontractor" previously adopted in *MacEvoy* and held that Cerpac was a "subcontractor" and, since Industrial, as a material supplier, had a direct contractual relationship with Cerpac, this Court held that Industrial was protected under the Miller Act.

The Court of Appeals in the instant case has completely misinterpreted the decisions of this Court in *MacEvoy* and *Rich*. Although the Court of Appeals recognized that Colquitt was "technically a sub-subcontractor" (App., *infra*, p. 4a), the Court proceeded to read out of the Act the limitation of the proviso of § 270b(a). Only in this way could it rule that Colquitt was a "subcontractor" rather than a *sub*-subcontractor. Petitioners submit that there is nothing in *Rich* to support the holding of the Court of Appeals that Colquitt was a "subcontractor" notwithstanding the fact that it had no contractual relationship with the prime contractor. Petitioners further submit that the fact that Colquitt performed a portion of the work called for under the prime contract does not make it a "subcontractor" within the common meaning of such term[8] or within the meaning of the Miller Act.

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[8] *Battista* v. *Horton*, *supra*.

3. The Court of Appeals' Interpretation of the Miller Act Is Clearly Contrary to the Expressed Intent of Congress.

The purpose of the Miller Act was to provide protection to those supplying labor or materials to a contractor on a federal construction project. Since a mechanics' lien cannot attach to Government property, an alternate remedy is provided through the procedure of requiring that the contractor furnish a payment bond. The legislative history of the Miller Act makes it clear that the Congress intended to extend the protection of a Miller Act bond only to third tier contractors:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond." H.Rep. No. 1203 (74th Cong., 1st Sess.), p. 3.

The use of the term "sub-subcontractor" in the Committee Report quoted above negates any contention that Congress intended to extend the protection of the Miller Act bond to the employees of a "sub-subcontractor" or beyond.

4. The Decision of the Court of Appeals Will Upset Traditional Relationships Between Contractors on Government Construction Projects and Result in Increased Construction Costs to the Government.

The Miller Act was enacted in 1935, Act of August 24, 1935, c. 642, 49 Stat. 793. While the Miller Act repealed the Heard Act, 40 U.S.C. § 270, it reinstated the basic provisions of the earlier law and was designed primarily to eliminate certain procedural limitations on its beneficiaries. *MacEvoy Co.* v. *United States, supra.*

Subsequent to this Court's decision in *MacEvoy*, and up until the Court of Appeals' decision in the instant case, the Federal Courts have, with the exception of one singular District Court, interpreted the Act as providing protection only to the third contractual tier. The leading case has been the Fifth Circuit's 1960 decision in *Elmer* v. *United States Fidelity & Guaranty Co., supra.* This Court denied *certiorari* in that case. 354 U.S. 854. Since *Elmer*, millions of dollars of federal construction projects have been let and thousands of contractors and subcontractors on those projects have awarded many millions of dollars of subcontracts and sub-subcontracts in reliance upon, not only the *Elmer* case, but also the decisions of the First, Fourth and Ninth Circuits, as well. To now extend the protection of the Miller Act bond to an ill-defined and indefinite group of "subcontractors" as suggested by the District of Columbia Circuit, will create a situation where it will be impossible to predict who is or is not protected by the Miller Act bond. For this reason, it will now be necessary for each subcontractor to require bonds from each sub-subcontractor on down the line *ad infinitem* to obtain full protection from unknown claimants.

It is no answer to say, as did the Court of Appeals, that Bateson could have protected itself from Colquitt's default. Bateson did require an indemnity agreement and bond from its subcontractor, Pierce. However, Pierce, believing that the protection of the Miller Act did not extend beyond Colquitt, required no indemnity agreement or bond from Colquitt. Had Pierce done so, Colquitt's contract price would have been increased by the amount of the bond premium. The Government would have had to ultimately bear this price increase for

it would have been reflected in Pierce's price to Bateson and, in turn, in Bateson's price to the Government.

The Court of Appeals' decision, and the conflict created thereby, if left standing, will create considerable confusion and uncertainty in an area of law thought to be well settled and will ultimately result in an increase in the cost of construction to the Government.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

Respectfully submitted,

JACK REPHAN
AND
RAYMOND R. DICKEY
1120 Connecticut Avenue, N.W.
Washington, D. C. 20036
Attorneys for Petitioners

Of Counsel:

DANZANSKY, DICKEY, TYDINGS,
QUINT & GORDON
1120 Connecticut Avenue, N.W.
Washington, D. C. 20036

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2199

UNITED STATES OF AMERICA for and on behalf of the BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, ET AL.

v.

J. W. BATESON COMPANY, INC., ET AL., *Appellants*

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil 74-699)

Argued December 9, 1976

Decided January 28, 1977

Henry J. Cappello, for appellants.

Donald J. Capuano, for appellees, Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, *et al. Glenn V. Whitaker,* was on the brief for appellees.

Before: WRIGHT and ROBB, *Circuit Judges* and GESELL,*

United States District Judge for the District Court for the District of Columbia

Opinion for the Court filed by *District Judge* GESELL.

Concurring opinion filed by *Circuit Judge* WRIGHT.

GESELL, *District Judge*: This case arises under the Miller Act, 40 U.S.C. §§ 270a *et seq.*, and involves the scope of the payment bond which prime contractors are obliged to provide as surety for work done on federal construction. The

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

District Court, Judge Aubrey E. Robinson, Jr., granted summary judgment on plaintiffs' claim against a Miller Act bond executed by defendant J. W. Bateson Co., Inc., which now appeals. We affirm.

The material facts are not in dispute. In August, 1971, Bateson contracted with the United States to build an addition to the Howard University Hospital. In accordance with the Miller Act. Bateson filed with the Government a payment bond for the protection of those furnishing labor or materials to the project. Bateson, as prime contractor, subcontracted with Pierce Associates for some of the work specified in the main contract. Pierce, in turn, contracted with the Colquitt Sprinkler Co., Inc. for part of this work, the installation of a sprinkler system as required by the contract specifications. Colquitt then signed a collective bargaining agreement covering its workers on the job with the National Sprinkler and Fire Control Association, and Local 669 of that union. Due to financial difficulties Colquitt failed to turn over to the union both fringe benefit funds and union dues which it had withheld from wages of workers on the job, as required by its agreement with the union. The union trustees thereafter notified Bateson they were filing a claim against the Miller Act payment bond for the money owing. When payment was refused suit was brought in the District Court.

The Miller Act, enacted in 1935, requires all Government contractors to execute a payment bond "for the protection of all persons supplying labor and material in the prosecution of the work provided for" in a Government construction contract. 40 U.S.C. § 270a. Like the Heard Act which it replaced,[1] the Miller Act carried forward settled congressional policy to ensure that those who aided in the completion of Government projects would not be financially injured by the default of a contractor who happened to be low bidder for a contract.

[1] The Heard Act, 28 Stat. 278 (1894), as amended 33 Stat. 811 (1905), 40 U.S.C. § 270, required that Government contractors file one bond. If a contractor defaulted the United States could sue on the bond with those who provided materials and labor intervening. But the United States had priority in any recovery. If the United States did not sue, private parties had to wait six months before filing their own actions. The Miller Act was intended to provide greater protection to subcontractors, laborers, and materialmen by requiring two bonds, a performance bond for the Government and a payment bond for private parties, and by shortening the time before suit. See H.R. Rep. No. 1263, 74th Cong., 1st Sess. (1935).

In *MacEvoy Co.* v. *United States*, 322 U.S. 102 (1944), the Supreme Court held that to be a proper claimant under a Miller Act bond one must have furnished labor or materials for a Government project pursuant to a contract with either the prime contractor or a subcontractor on the project. Noting that the Act does not define "subcontractor," the Court adopted a functional definition, stating:

> . . . a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract . . . .
>
> 322 U.S. at 109.

Later, in *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116 (1974), the Court endorsed the functional approach of *MacEvoy*. It held that the test for determining whether an entity was a subcontractor was "the substantiality and importance of his relationship with the prime contractor" because where a substantial relationship exists the prime contractor can adequately protect itself against loss. *Rich, supra*, at 123.

A comparison of the results in *MacEvoy* and *Rich* makes this test clear. In *MacEvoy* a supplier contracting with a materialman of the prime contractor could not claim against the bond because he did not have a contract

with a subcontractor or perform any work on the job. However, a similar claim was allowed in *Rich* because while the supplier technically contracted with only a materialman, functionally the materialman was a subcontractor, since he performed part of the original contract and the prime contractor was in a position to protect himself against any loss from the materialman's default. This functional approach emphasizes the view originally taken by the Court in *MacEvoy* when it highlighted the remedial nature of the Act. The Court said:

> The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and aplication in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects.
>
> *MacEvoy Co.* v. *United States, supra* at 107.

In the case before us the Union's contract was with Colquitt which was technically a sub-subcontractor. While defendants concede that Colquitt itself could claim under the bonds since it had a contract with subcontractor Pierce, they claim Colquitt's employees cannot because they only had a relationship with a sub-subcontractor. As noted, this formalistic analysis was soundly rejected in *Rich*. The real question is whether Colquitt performed work provided for in the main contract and had such a relationship with prime contractor that the prime, Bateson, could have protected itself from Colquitt's default.' If so, Colquitt is a subcontractor and its employees may claim against the payment bond.

Colquitt was installing a sprinkler system in the addition to the hospital. The work was specifically required by Bateson's contract with the Government and was an integral and significant part of that contract. The importance of this work is evidenced by the fact that Pierce itself hired Colquitt's employees to finish the job when

Colquitt because of its financial difficulties could no longer perform.

The District Court found the relationship between Bateson and Colquitt "substantial and important." This is borne out by the nature of the work and the fact that it was performed over a substantial period of time. Moreover, it appears from the record that copies of Colquitt's payroll statement were submitted to Bateson.[2] Since Colquitt's work was part of the main contract, was performed on the job site, and was of such obvious importance, Bateson was in a position to protect itself from Colquitt's default by obtaining security through bond or otherwise. *See MacEvoy, supra* at 110. Colquitt, therefore, was a subcontractor under the Miller Act and the union trustees are proper claimants under the bond. *See United States* v. *Carter Coal*, 353 U.S. 210 (1957).

Appellant also asserts that plaintiffs waived their rights under the bond by not acting against Colquitt, as they might have under their contract, and that they are estopped from asserting their claims. This argument is without merit. *See United States* v. *Glassman Construction Co.*, 397 F.2d 8 (4th Cir. 1968).

Affirmed.

WRIGHT, *Circuit Judge, concurring*: I concur in the judgment of the court in this case. I am also in general agreement with the court's opinion. The Miller Act makes clear that a prime contractor on a public building shall furnish "[a] payment bond with a surety or sureties • • • for the protection of all persons supplying labor and material in the prosecution of the work provided for in said

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[2] Plaintiffs filed a request for the admission of the genuineness of documents "to the extent that they are the Contractor's Weekly Payroll Statements submitted by Colquitt Sprinkler Company, Inc. to the General Services Administration and /or J. W. Bateson Company, Inc. . . ." Defendants apparently never bothered to respond to these requests.

contract for the use of each such person." 40 U.S.C. § 270a (2) 1970). The Miller Act further provides:

> (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance therof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him[.] * * *

40 U.S.C. § 270b(a) (1970). Thus the congressional intent is "to protect those whose labor and materials go into public projects" because such costs are not recoverable against the United States. *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944). Whether the labor and materials are furnished directly to the prime contractor or through a subcontractor or a sub-subcontractor is irrelevant as far as the protection provided by the Act is concerned. If the prime contractor wants to protect himself against loss caused by subcontractors, he can "'*secure himself against loss by requiring the subcontractors to give security by bond, or otherwise, for the payment of those who contract directly with the subcontractors. . . .*'" *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 123 (1974), *quoting MacEvoy Co.* v. *United States, supra*, 322 U.S. at 110 (emphasis by the *Rich* Court). And if he permits subcontractors to further subcontract, such permission can be made contingent on similar security being provided by the sub-subcontractor.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1476

J. W. BATESON COMPANY, INC., ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR CERTIORARI FILED APRIL 25, 1977
CERTIORARI GRANTED JUNE 27, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1476

J. W. BATESON COMPANY, INC., ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, ET AL., *Respondents*

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RELEVANT DISTRICT COURT DOCKET ENTRIES

Date	Civil Docket
1974	
May 23	Motion by defts. to dismiss; P&A's; c/m 5-20-74. Appearance of Henry J. Cappello.
June 13	Response of plts. to defts' motion to dismiss; c/m 6-11-74.
June 18	Reply by defts to pltfs' response to defts' motion to dismiss; c/m 6-14-74.
Jul 3	Order denying deft's motion to dismiss (N) Robinson, J.
Jul 15	Motion of defts. to reconsider defts' motion to dismiss, or in alternative to certify decision for interlocutory appeal; P&A, c/m 7-11-74.
Jul 15	Request No. 1 by pltfs. for production of documents; c/m 7-12-74.
Jul 23	Response of pltfs' to defts' motion to reconsider the motion to dismiss the alternative, to certify the Court's order for an interlocutory; c/m 7-22-74.
Jul 26	Order denying motion to reconsider defts' motion to dismiss; denying motion to certify Court's order of 7-3-74 for appeal pursuant to 28 U.S.C. 1292(b). (N) Robinson, J.
Aug 5	Answer of defts. to complaint; c/m 8-2-74.
Nov 1	Request by pltff. for admissions of fact; c/m 10-30-74.
Nov 20	Response by defts. to pltfs. request for admissions of fact; c/m 11-19-74.
Dec 17	Request by pltff. for admissions as to the genuineness of certain documents; attachments (26); c/m 12-16-74.
1975	
Feb 18	Motion of deft for summary judgment; memorandum; affidavit of Lewis L. Pierce; statement; request for oral argument; c/m 2-13-75.

1975

Mar 24—Cross-Motion by pltff for summary judgment; memorandum; affidavit of Glenn V. Whitaker with attachment; affidavit of Joseph Hajkowski; table of cases; statement; c/m 3-23-75.

Apr 7—Memorandum by defts in opposition to pltffs' cross-motion for summary judgment; c/m 4-4-75.

Apr 17—Response of pltff to memorandum of deft. in opposition to cross-motion for summary judgment; c/m 4-16-75.

June 6—Order denying defts' motion for summary judgment; granting pltffs' cross-motion for summary judgment. (N) Robinson, J.

July 1—Notice of Appeal by defts. from Order of June 6, 1975. $5.00 paid and credited to U.S. Copy mailed to Glenn V. Whitaker.

Oct 23—Motion of defts to certify for appeal pursuant to 28 U.S.C. 1291-1292; P&As; approved by counsel for pltft.

Oct 29—Order certifying determination of Court granting summary judgment to pltff to U.S. Court of appeals pursuant to 28 U.S.C. Sec. 1291-1292; staying proceedings pending determination of said appeal.

Nov 4—Notice of Appeal by J. W. Bateson Co., Inc. and Centex Corp. from Order entered June 6, 1975 and pursuant to 28 U.S.C. 1291-1292. Copy mailed to Glen V. Whitaker. $5.00 paid and credited to U.S.

1977

Feb 23—Certified copy of Judgment from USCA affirming judgment from the USDC in accordance with the opinion of this Court; Bill of Costs as taxed by Clerk of Court of Appeals; Opinion attached.

COURT OF APPEALS DOCKET ENTRIES

Notice of Appeal Filed: November 4, 1975

12-10-75—Certified Original Record (no transcripts) (n-2)

1-12-76—4-Appellants' motion to adopt brief previously submitted in Case No. 75-1761 (m-30).

1-12-76—4-Appellants' motion to permit filing of additional copies of record in lieu of joint appendix (m-9).

1-14-76—Clerk's order granting appellants' motion to adopt brief previously submitted in Case #75-1761 and counsel is granted leave to withdraw the brief previously filed in #75-1761 and, after making the appropriate changes to conform to the caption and to comply with any recently amended rules of this Court, file it as appellants' brief herein; the time for filing appellees' brief is extended to February 13, 1976.

1-15-76—15-Appellants' brief (p-15).

1-19-76—Order per CJ Bazelon that counsel for appellants is granted leave to file 7 copies of the relevant portions of the record, in xerox form in lieu of printed a joint appendix.

1-19-76—7-Copy of record in lieu of appendix (p-15).

2-2-76—4-Appellee's (Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, et al.) motion to extend time to file brief to March 5th (m-2).

2-5-76—Clerk's order granting appellees' (Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, et al.) motion to extend time to file brief to March 5, 1976.

3-5-76—25-Appellees' Brief (p-5).

3-11-76—15-Appellants' reply brief. (m-10).

3-17-76—Clerk's order sue sponte, placing this case on the summary calendar.

12-9-76—Argued before Wright and Robb, CJ and Gerhard A. Gesell, U.S. District Judge for the U.S. District Court for the District of Columbia sitting by designation.

1-28-77—Opinion for the Court filed by District Judge Gesell.

1-28-77—Concurring opinion filed by Circuit Judge Wright.

2-4-77—11-Appellants' petition for rehearing, or, in the alternative for hearing en banc (m-4).

2-11-77—1-Bill of Costs filed by Appellees (m-11).

2-16-77—Per Curiam order denying appellants' petition for rehearing. Wright and Robb, CJ and Gesell, U.S. District Judge for the U.S. District Court for the District of Columbia, sitting by designation.

2-16-77—Per Curiam order en banc that appellants' suggestion for rehearing en banc is denied; CJ Bazelon; Wright, McGowan, Tamm, Leventhal, Robinson, Mackinnon, Robb and Wilkey, CJ.

2-16-77—Information copy of the above orders sent to Clerk, U.S. District Court and a copy sent to Judge Robinson.

2-22-77—Certified copy of judgment, and a copy of opinion and bill of costs in the amount of $127.92 issued to District Court.

5-2-77—Notice of filing of a petition for writ of certiorari in S.C. No. 76-1476 on April 25, 1977.

6-7-77—Receipt dated 5-19-77 for original record.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-699

UNITED STATES OF AMERICA for and on behalf of the BOARDS OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY WELFARE FUND, AND THE NATIONAL AUTOMATIC SPRINKLER LOCAL 669, U.A. EDUCATIONAL FUND, consisting of: JOSEPH HAJKOWSKI, THOMAS W. HANNA, THOMAS J. DEVLIN, CLYDE C. CLEARE, KENNETH G. HOLLAWAY, RAYMOND J. CASEY, RICHARD D. SULLIVAN, MAURICE D. BERNIER, 6135 Kansas Avenue, N.E., Washington, D.C. 20011

and

ROAD SPRINKLER FITTERS LOCAL UNION No. 669, U.A., 7411 Riggs Road, Adelphi, Maryland 30783,

Plaintiffs,

v.

J. W. BATESON COMPANY, INC., and CENTEX CORPORATION, a Joint Venture, d.b.a. J. W. BATESON COMPANY, 10150 Monroe Drive, P.O. Box 20677, Dallas, Texas 75220

and

THE AETNA CASUALTY AND SURETY COMPANY, Hartford, Connecticut 06115

and

AMERICAN RE-INSURANCE COMPANY, 99 John Street, New York, New York 10038

and

EMPLOYERS RE-INSURANCE CORPORATION, Kansas City, Missouri 64142

and

GENERAL REINSURANCE CORPORATION, 400 Park Avenue,
New York, New York 10022

and

THE HOME INSURANCE COMPANY, New York, New York,
Defendants

Complaint

Comes now the Plaintiffs, by and through their attorneys and allege:

1. That jurisdiction of this cause is conferred by Title 40 of the United States Code, Sections 270a and 270b, as amended.

2. That the National Automatic Sprinkler Industry Pension Fund, the National Automatic Sprinkler Industry Welfare Fund and the National Automatic Sprinkler Local 669, U.A. Educational Fund (hereinafter "Local 669 Funds"), are employee fringe benefit funds established for the benefit of employees represented by Road Sprinkler Fitters Local Union No. 669 U.A. (hereinafter "Local 669") pursuant to Articles XIX, XX and XXI of the collective bargaining agreement between Colquitt Sprinkler Company, Inc. (hereinafter "Colquitt") and Local 669, a copy of the agreement is attached as Exhibits 1 and 2.

3. That Local 669 is an unincorporated labor organization representing sprinkler fitters employed by Colquitt throughout the United States.

4. That Defendant J. W. Bateson Company (hereinafter "Contractor") is a joint venture consisting of J. W. Bateson Company, Inc. and Centex Corporation, transacting business in the District of Columbia and contracting to supply services in the District of Columbia at all times pertinent as herein alleged.

5. That Defendant Aetna Casualty and Surety Company (hereinafter "Surety") is a corporation contracting

to insure or act as surety for a risk, contract, obligation or agreement located, executed or to be performed in the District of Columbia.

6. That Defendant American Re-Insurance Company (hereinafter "Surety") is a corporation contracting to insure or act as surety for a risk, contract, obligation or agreement located, executed or to be performed in the District of Columbia.

7. That Defendant Employers Re-Insurance Corporation (hereinafter "Surety") is a corporation contracting to insure or act as surety for a risk, contract, obligation or agreement located, executed or to be performed in the District of Columbia.

8. That Defendant General Reinsurance Corporation (hereinafter "Surety") is a corporation contracting to insure or act as surety for a risk, contract, obligation or agreement located, executed or to be performed in the District of Columbia.

9. That Defendant Home Insurance Company (hereinafter "Surety") is a corporation contracting to insure or act as surety for a risk, contract, obligation or agreement located, executed or to be performed in the District of Columbia.

10. That on August 10, 1971, Defendant Contractor entered into a written contract with the United States of America, Plaintiff, acting by and through the General Services Administration for the construction of an addition to the Howard University Hospital, being Contract No. G5-03-B-15676, for the principal sum of $39,015,272.20.

11. That on August 12, 1971, Defendant Contractor, along with Defendant Sureties, duly executed and delivered to the United States Government a payment bond for the protection of all persons supplying labor and materials in the prosecution of the work provided for in Contract No.

G5-03-B-15676; that the bond was duly executed in accordance with the provisions of Title 40 of the United States Code, Section 270a in the sum of $2,500,000.00. A copy of the bond is attached as Exhibit 3.

12. That Colquitt is a subcontractor engaged by a subcontractor of the Defendant Contractor, and that between the dates May 1, 1973 and December 1, 1973, members of Local 669, at the special instance and request of Colquitt, performed 4749 hours of labor in the prosecution of the work provided for in the principal contract between the Plaintiff and the Contractor; that pursuant to Articles XIX, XX and XXI of its collective bargaining agreement with Local 669, Colquitt was required to pay into the Local 669 Funds certain specified sums of money for each hour worked by employees of Colquitt at Colquitt's request who were represented by Local 669; that pursuant to Article XXIV of the collective bargaining agreement with Local 669, Colquitt was required to withhold from the wages of its employees represented by Local 669 the sum of 50¢ for each hour worked by its employees and submit this withheld money to a Vacation Fund maintained by the Riggs National Bank; that pursuant to Article IV of the collective bargaining agreement with Local 669, Colquitt was required to withhold union membership dues from the wages of its employees represented by Local 669 who executed "Authorization for Check-Off of Work Assessment" forms, and remit these withheld monies to Local 669; that none of the monies referred to above have been paid by Colquitt to the respective funds and Local 669; that the total amount due is $8,021.78.

13. That on or about December 1, 1973, was the date on which the members of Local 669 employed by Colquitt performed the last of the labor at Colquitt's request.

14. That on or about December 10, 1973, Plaintiffs, pursuant to Title 40 of the United States Code, Section

270b, served written notice upon Defendant Contractor of their claim for the amount owed resulting from labor performed in the prosecution of the work provided for in the primary contract; that said notice was duly served by registered mail in the manner provided for in Title 40 of the United States Code, Section 270b, accurately stated the amount claimed and the name of the party to whom the labor was supplied, and otherwise complied with the provisions of the aforesaid statute.

WHEREFORE, Plaintiffs pray judgment in the amount of $8,021.78, plus costs, interest and attorneys' fees.

Respectfully submitted,

O'DONOGHUE & O'DONOGHUE

/s/ By: DONALD J. CAPUANO
Donald J. Capuano

/s/ GLEN V. WHITAKER
Glenn V. Whitaker
1912 Sunderland Place, N.W.
Washington, D.C. 20036
Attorneys for Plaintiffs
785-2237

EXHIBITS 1 AND 2 TO COMPLAINT

• • • •

AGREEMENT BETWEEN

NATIONAL AUTOMATIC SPRINKLER AND FIRE CONTROL ASSOCIATION, INC.

AND

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.

COVERING

RULES, REGULATIONS AND WORKING CONDITIONS
APPRENTICESHIP STANDARDS

April 1, 1973

• • • •

ARTICLE 4

DUES CHECK-OFF: The employer agrees to deduct Union Membership Dues lawfully and uniformly levied by the Union in accordance with the Constitution and By-Laws of the Union from the pay of each employee who executes or has executed the following "Authorization for Check-Off of Work Assessment" form. Such deductions shall be computed and deducted weekly and remitted to Local Union 669 monthly, not later than the 15th day of each month following the month in which the wages were paid.

• • • •

ARTICLE 19

NATIONAL AUTOMATIC SPRINKLER INDUSTRY WELFARE FUND: It is mutually agreed that a Welfare Fund on a National Automatic Sprinkler Industry basis has been established for those employees who are covered by this Collective Bargaining Agreement.

There has been created a Board of Trustees of six (6) members, three (3) appointed by the National Automatic

Sprinkler and Fire Control Association, Inc. and three (3) Union Trustees, two (2) appointed in accordance with Local Union 669's Constitution and By-Laws and one (1) appointed in accordance with the National Automatic Sprinkler Industry Welfare Fund Trust Agreement.

The Board of Trustees shall administer the existing Agreement and Declaration of Trust in accordance with Federal, State and local laws and shall continue to take all necessary steps to carry out the legal operation of this Welfare Fund.

Effective April 1, 1973, each contractor shall pay to the Fund Forty Cents ($.40) per hour for all hours worked by all employees who come under the jurisdiction of this Collective Bargaining Agreement.

Effective April 1, 1974, each contractor shall pay to the Fund Fifty Cents ($.50) per hour for all hours worked by all employees who come under the jurisdiction of this Collective Bargaining Agreement.

ARTICLE 20

NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND: It is mutually agreed that a Pension Fund on a National Automatic Sprinkler Industry basis has been established for those employees who are covered by this Collective Bargaining Agreement.

There has been created a Board of Trustees of six (6) members, three (3) appointed by the National Automatic Sprinkler and Fire Control Association, Inc. and three (3) Union Trustees, two (2) appointed in accordance with Local Union 669 Constitution and By-Laws and one (1) appointed in accordance with the National Automatic Sprinkler Industry Pension Fund Trust Agreement.

The Board of Trustees shall administer the existing Agreement and Declaration of Trust in accordance with Federal, State and local laws and shall continue to take all

necessary steps to carry out the legal operation of this Pension Fund.

Effective April 1, 1973, each contractor shall pay to the Fund Sixty Cents ($.60) per hour for all hours worked by all employees who come under the jurisdiction of this Collective Bargaining Agreement.

Effective April 1, 1974, each contractor shall pay to the Fund Seventy Cents ($.70) per hour for all hours worked by the employees who come under the jurisdiction of this Collective Bargaining Agreement.

ARTICLE 21

NASA—LOCAL 669 INDUSTRY EDUCATION FUND: It is mutually agreed that an Apprenticeship System has been established for the purpose of providing Educational Training as provided by the Apprenticeship Standards.

An Educational Trust Fund has been established. There has been created a Board of Trustees consisting of six (6) members: three (3) appointed by the National Automatic Sprinkler and Fire Control Association, Inc. and three (3) Union Trustees appointed in accordance with the Constitution and By-Laws of the Local Union 669.

The duty of this Board of Trustees shall be to administer the existing Agreement and Declaration of Trust in accordance with Federal, State and local laws and to take all necessary steps to carry out the legal operation of the above agreed Educational Fund. Effective April 1, 1973, each contractor shall pay to the Fund Seven Cents ($.07) per hour for all hours worked by all employees whose wages are covered by this Collective Bargaining Agreement.

Effective April 1, 1974, each contractor shall pay to the Fund Eight Cents ($.08) per hour for all hours worked by all employees whose wages are covered by this Collective Bargaining Agreement.

ARTICLE 22

MONTHLY REPORTS: Employers party to this Agreement shall submit contributions to the Welfare, Pension and Educational Funds in accordance with rules, regulations and procedures established by the Trustees of the Welfare, Pension and Educational Funds.

The Employer agrees that the Trustees of the Welfare Trust, the Pension Trust and the Educational Trust, or their designees, shall have the authority to order an audit of the payroll, wage and related records (including supporting work sheets) of the Employer for the purpose of insuring compliance with the terms of this Agreement requiring contributions to the Trust Funds.

The Employer agrees that in the event the Trustees institute or participate in legal proceedings to collect payments or contributions from an Employer, the Employer shall also be required to pay reasonable attorney's fees, expenses of collection and interest at the highest rate permitted by the laws of the State where the legal proceeding is instituted.

Each contractor who is a subscriber to this Agreement or who desires to become a subscriber to this Agreement shall furnish to the Union a cash or surety bond in an amount not less than Five Thousand Dollars ($5,000.00) to guarantee contributions for Welfare, Pension, Educational, Vacation and Dues payments in the manner and in the amount required by this Agreement.

• • • •

ARTICLE 24

VACATION SAVINGS PLAN: The purpose of vacations is to provide rest and relaxation for sprinkler fitters and/or apprentices and to encourage the sprinkler fitter and/or apprentice to remain in the sprinkler industry.

There is established a Vacation Plan for the employees covered by this Collective Bargaining Agreement on a basis of each hour worked. The Employer shall withhold from the "NET WAGES" of each employee covered by this Collective Bargaining Agreement Fifty Cents ($.50) for each hour worked on and after April 1, 1973.

• • • •

AGREEMENT

THIS AGREEMENT made this 7th day of April, 1973, by and between the Road Sprinkler Fitters Local Union 669 (hereinafter called "Union") and .... (hereinafter called "Employer").

• • • •

WHEREAS, the said Employer is desirous of hiring and employing journeymen sprinkler fitters and apprentices; and

WHEREAS, the Union has competent and skilled journeymen and apprentice sprinkler fitters;

NOW, THEREFORE, it is mutually agreed as follows:

(1) That the Employer and the Union mutually agree to be bound by the terms and conditions of the Agreement between the National Automatic Sprinkler and Fire Control Association, Inc. and the United Automatic Sprinkler Fitters and Apprentices Local Union 669, dated the 30th day of March 1973 and effective April 1st, 1973 and all addendums and supplements thereto, copy of which are hereto attached and made a part hereof, the same as if the Employer and the Union were parties thereto; and the Employer and the Union herewith adopt said Agreement as and for their contract of employment and that all the journeymen sprinkler fitters and their apprentices hired by the Employer are to be employed according to the terms and conditions of employment contained in said Agreement.

(2) The Employer and Union do further agree to be bound by the Declarations and Trust establishing a Local Union 669 Health and Welfare Fund and separate Education Fund made between the National Automatic Sprinkler and Fire Control Association, Inc. and the United Automatic Sprinkler Fitters and Apprentices Local Union 669—dated the 2nd day of April, 1953 and separate Pension Fund dated the 1st day of April, 1957, and the Employer agrees to be bound thereby and by all amendments made thereto the same as if the Employer and the Union were parties to said Declaration of Trust.

(3) The Employer further agrees to make the necessary financial contributions to the Local Union 669 Health and Welfare Fund and Education Fund and Pension Fund as required by the collective bargaining agreement effective April 1st, 1967 and the said Declarations of Trust. The Employer hereby authorizes the parties to name Trustees and successor Trustees to administer the Health and Welfare Trust Fund and Education Trust Fund and Pension Trust Fund, and hereby ratifies and accepts such Trustees and the terms and conditions of the Trust as if fully made by the Employer and Union together.

WITNESS our hands and seals this 7th day of April, 1973.

FOR THE UNION:
ROAD SPRINKLER FITTERS
LOCAL UNION 669

/s/ By JOSEPH HAJKOWSKI
Joseph Hajkowski
President, Local 669
P.O. Box 773
7411 Riggs Road
Adelphi, Maryland 20783

FOR THE EMPLOYER:

.....
Name of Firm
/s/ By JAMES M. COLQUITT
James M. Colquitt
President

EXHIBIT 3 TO COMPLAINT

PAYMENT BOND
(*See Instructions*)

Date Bond Executed (*Must be same or later than date of contract*)—August 12, 1971

Principal (*legal name and business address*)—
J. W. Bateson Company, Inc. and Centex Corporation, a Joint Venture DBA J. W. Bateson Company, 10150 Monroe Drive, P.O. Box 20677, Dallas, TX 75220

Surety (ies) (*Names and business address*)—

The Aetna Casualty and Surety Company, Hartford, Conn.
American Re-Insurance Company, New York, New York
Employers Reinsurance Corporation, Kansas City, Mo.
General Reinsurance Corporation, New York, N.Y.
The Home Insurance Company, New York, N.Y.

Penal Sum of Bond: Millions—2; thousands—500; hundreds—000; cents—00.

Contract Date—August 10, 1971

Contract No.—GS-03B-15676 "NEG"

KNOW ALL MEN BY THESE PRESENTS, That we, the Principal and Surety(ies) hereto, are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally: *Provided,* That, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set

forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the Principal entered into the contract identified above;

NOW, THEREFORE, if the Principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the Surety(ies) being hereby waived, then the above obligation shall be void and of no effect.

IN WITNESS WHEREOF, the Principal and Surety(ies) have executed this payment bond and have affixed their seals on the date set forth above.

PRINCIPAL

/s/ JOHN A. WACKER,
John A. Wacker, President of
J. W. Bateson Company, Inc.
a member of the Joint Venture.

• • • •

INSTRUCTIONS

1. This form, for the protection of persons supplying labor and material, shall be used whenever a payment bond is required under the act of August 24, 1935, 49 Stat. 793, as amended (40 U.S.C. 270a-270e). There shall be no deviation from this form without approval by the Administrator of General Services.

2. The full legal name and business address of the Principal shall be inserted in the space designated "Principal" on the face of the form. The bond shall be signed by an authorized person. Where such person is signing in a representative capacity (e.g., an attorney-in-fact), but is not a

member of the firm, partnership, or joint venture, or an officer of the corporation involved, evidence of his authority must be furnished.

3. (a) Corporations executing the bond as sureties must be among those appearing on the Treasury Department's list of approved sureties and must be acting within the limitations set forth therein. Where more than a single corporate surety is involved, their names and addresses (city and State) shall be inserted in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)", and in the space designated "SURETY(IES)" on the face of this form only the letter identification of the Sureties shall be inserted.

(b) Where individual sureties execute the bond, they shall be two or more responsible persons. A completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. Such sureties may be required to furnish additional substantiating information concerning their assets and financial capability as the Government may require.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Seal"; and, if executed in Maine or New Hampshire, shall also affix an adhesive seal.

5. The name of each person signing this payment bond should be typed in the space provided.

• • • •

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Motion to Dismiss

Defendants, by counsel, move this Honorable Court to dismiss the Complaint filed heretofore by plaintiff for failure to state a cause of action, or, in the alternative, on the ground that this Court does not have jurisdiction over the subject matter, for the reasons set forth in the attached Memorandum of Points and Authorities.

ROTHWELL, CAPPELLO & BERNDTSON

By /s/ HENRY J. CAPPELLO
Henry J. Cappello
Attorney for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-699

UNITED STATES OF AMERICA for and on behalf of the BOARDS OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, et al., *Plaintiffs*

v.

J. W. BATESON COMPANY, INC., *Defendant*

(FILED JULY 3, 1974)

Order

Upon consideration of Defendant's Motion to Dismiss, the Opposition thereto, and the entire record herein, it appearing to the Court that the definition of a "subcontractor" as used in Section 270b(a) of the Miller Act, 40 U.S.C. § 270b(a), is a "functional rather than a technical definition," *F. D. Rich Co., Inc.* v. *United States*, —— U.S. ——, 42 U.S.L.W. 4783, 4785, and that it is the nature of the relationship of the parties which is therefore controlling rather than any lable such as "third-tier" or otherwise, and it further appearing that the relationship of the Colquitt Sprinkler Company to the J. W. Bateson Company herein was both substantial and important, and that Colquitt Sprinkler Company is therefore a subcontractor herein within the meaning of the Miller Act, now therefore, it is this 3rd day of July, 1974;

ORDERED that the Motion to Dismiss be and hereby is DENIED.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Motion to Reconsider Defendants' Motion to Dismiss, or in the Alternative, to Certify Decision for Interlocutory Appeal

Defendants, by counsel, move this Honorable Court to reconsider its decision set forth in its Order filed July 3, 1974 denying defendants' Motion to Dismiss, or in the alternative to certify said decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), for the reasons set forth in the attached Memorandum of Points and Authorities.

ROTHWELL, CAPPELLO & BERNDTSON

/s/ By HENRY J. CAPPELLO
Henry J. Cappello
Attorney for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Request No. 1 for Producton of Documents

Plaintiffs Boards of Trustees of the National Automatic Sprinkler Industry Pension Fund, the National Automatic Sprinkler Industry Welfare Fund, and the National Automatic Local 669, U.A. Educational Fund and Road Sprinkler Fitters Local Union No. 669, U.A. hereby request the Defendants to respond within thirty (30) days of the date of the Certificate of Service to the following request: That the Defendants on August 14, 1974, at 10:00 a.m. at 1912 Sunderland Place, N.W., Washington, D.C. 20036, or at another reasonable place agreed by the parties, produce and permit Plaintiffs to inspect and copy each of the following documents:

1. All copies of certified payroll statements submitted by Colquitt Sprinkler Company, Inc. to the Government Services Administration.

2. All other payroll statements or records which indicate the number of hours worked by each of Colquitt's employees on the Howard University Hospital Project being Contract No. 65-03-B-15676.

3. Contract No. 65-03-B-15676 between the United

States of America and J. W. Bateson Company, Inc. and Centrex Corporation, a Joint Venture, doing business as, J. W. Bateson Company.

Respectfully submitted,

O'DONOGHUE & O'DONOGHUE

/s/ By DONALD J. CAPUANO
Donald J. Capuano

/s/ GLEN V. WHITAKER
Glenn V. Whitaker
1912 Sunderland Place, N.W.
Washington, D.C. 20036
(202) 785-2237
Attorneys for Plaintiffs

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

Civil Action No. 74-699

UNITED STATES OF AMERICA for and on behalf of the BOARDS OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, et al., *Plaintiffs*

v.

J. W. BATESON COMPANY, et al., *Defendants*

FILED JULY 26, 1974

Order

Upon consideration of Defendants' Motion to Reconsider Defendants' Motion to Dismiss, Or in the Alternative, to Certify the Court's Order of July 3, 1974, for Interlocutory Appeal, and the entire record herein, it appearing that there is no legal or other basis for the Defendants' Motion to Reconsider, and it further appearing that an immediate appeal pursuant to 28 U.S.C. § 1292(b) is not warranted by the circumstances of this case, now therefore, it is this 26th day of July, 1974, by the United States District Court for the District of Columbia,

ORDERED that the Motion to Reconsider be and hereby is DENIED;

ORDERED that the Motion to Certify the Court's Order of July 3, 1974, for Appeal Pursuant to 28 U.S.C. § 1292(b) be and hereby is DENIED.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Answer

FIRST DEFENSE

The Complaint fails to state a claim against defendants upon which relief can be granted.

SECOND DEFENSE

The plaintiffs have no standing to bring this action under 40 U.S.C. §§ 270a and 270b, not being a "person having direct contractual relationship with a subcontractor" or a person with a "contractual relationship express or implied with the contractor furnishing the payment bond."

THIRD DEFENSE

The plaintiffs by failing to collect contributions required by terms of the collective bargaining agreement between Local 669 and Colquitt Sprinkler Company, Inc., within a reasonable time following wage payments to employees by Colquitt, are guilty of laches and are estopped to claim that defendants are responsible for making contributions which Colquitt was obligated to make to plaintiffs.

FOURTH DEFENSE

By terms of the Collective Bargaining Agreement, Article 23, (Complaint Exhibits 1 and 2) the contractor (Colquitt) was required to furnish a surety bond to guarantee payment of contributions required by the Agreement; proceeding against this bond and the surety thereon is the exclusive remedy of the plaintiffs under this Agreement. By failure to obtain the monthly deposit reports required by the Agreement, to exercise their authority to audit the

records, otherwise insure compliance with the provisions of the Collective Bargaining Agreement, and to proceed in a timely manner against the surety bond, plaintiffs are estopped to bring this action against innocent third parties having no contractual privity to plaintiffs and no duty to police disbursement of funds by Colquitt.

FIFTH DEFENSE

Plaintiffs having knowledge of Colquitt's defaults in making deposits, as required by the Collective Bargaining Agreement in essence authorized a loan to Colquitt of the moneys due, thereby exceeded their authority as Trustees and fiduciaries and therefore may be personally liable to the beneficiaries of said Trusts; defendants having no knowledge and not having acquiesced in said loan, have no liability to plaintiffs or said beneficiaries. Upon insolvency of Colquitt, the Trustees and their beneficiaries, became mere unsecured creditors of Colquitt and have waived any rights they might otherwise have had under the Miller Act. Their claim, if any, attaches only to such sums as may be due to Colquitt by the subcontractor with whom Colquitt contracted. No moneys are owed by Colquitt under this contract.

SIXTH DEFENSE

Defendants deny the allegations of paragraph 1.

Defendants admit the allegations of paragraphs 4, 5, 6, 7, 8, 9, and 10 of the Complaint. Defendants admit the allegations of paragraph 11, except that defendants deny that the payment bond was for the protection of *all* persons supplying labor and material". Defendants allege that they are without knowledge or information sufficient to form

a belief as to the truth of the allegations contained in paragraphs 2, 3, 12, 13 and 14 of the Complaint.

ROTHWELL, CAPPELLO & BERNDTSON

/s/ By HENRY J. CAPPELLO
Henry J. Cappello
Attorney for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Request for Admissions of Fact

Come now the Plaintiffs, by and through counsel, and hereby request that the Defendants admit or deny the truth of the following facts, pursuant to Rule 36, Federal Rules of Civil Procedure.

1. That William Brooks worked 22 hours for Colquitt at the Howard University Hospital Project at the wage rate of $9.50 per hour.

2. That William Brooks worked 32 hours for Colquitt at the Howard University Hospital Project at the wage rate of $9.65 per hour.

3. That Dalton Stowe worked 6 hours for Colquitt at the Howard University Hospital Project at the wage rate of $10.00 per hour.

4. That Dalton Stowe worked 45 hours for Colquitt at the Howard University Hospital Project at the wage rate of $10.15 per hour.

5. That James Brown worked 8 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.75 per hour.

6. That James Brown worked 8 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.90 per hour.

7. That Edward Cook worked 472 hours for Colquitt at the Howard University Hospital Project at the wage rate of $9.50 per hour.

8. That Edward Cook worked 432 hours for Colquitt at the Howard University Hospital Project at the wage rate of $9.65 per hour.

9. That Robert Farish worked 488 hours for Colquitt at the Howard University Hospital Project at the wage rate of $7.61 per hour.

10. That Robert Farish worked 120 hours for Colquitt at the Howard University Hospital Project at the wage rate of $7.74 per hour.

11. That Robert Farish worked 216 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.09 per hour.

12. That Thomas Hall worked 296 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.75 per hour.

13. That Robert Hartzell worked 464 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.83 per hour.

14. That Robert Hartzell worked 80 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.94 per hour.

15. That Robert Hartzell worked 248 hours for Colquitt at the Howard University Hospital Project at the wage rate of $7.21 per hour.

16. That James Martin worked 5 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.75 per hour.

17. That Jack Pickrel worked 480 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.75 per hour.

18. That Jack Pickrel worked 416 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.90 per hour.

19. That James Stone worked 14 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.56 per hour.

20. That James Stone worked 56 hours for Colquitt at the Howard University Project at the wage rate of $6.68 per hour.

21. That Clarence Sampson worked 16 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.75 per hour.

22. That Clarence Sampson worked 80 hours for Colquitt at the Howard University Hospital Project at the wage rate of $8.90 per hour.

23. That Roy Corvin worked 96 hours for Colquitt at the Howard University Project at the wage rate of $9.50 per hour.

24. That Roy Corvin worked 104 hours for Colquitt at the Howard University Hospital Project at the wage rate of $9.65 per hour.

25. That Larry Howe worked 88 hours for Colquitt at the Howard University Project at the wage rate of $6.04 per hour.

26. That Larry Howe worked 56 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.14 per hour.

27. That Larry Howe worked 40 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.41 per hour.

28. That Bryon Roshto worked 72 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.04 per hour.

29. That Bryon Roshto worked 48 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.14 per hour.

30. That H. B. Watson worked 16 hours for Colquitt at the Howard University Hospital Project at the wage rate of $6.94 per hour.

31. That H. B. Watson worked 256 hours for Colquitt at the Howard University Hospital Project at the wage rate of $7.21 per hour.

32. That Ronald Strobel worked 244 hours for Colquitt at the Howard University Hospital Project at the wage rate of $9.65 per hour.

33. That Warren Souder worked 20 hours for Colquitt at the Howard University Hospital Project at the wage rate of $7.21 per hour.

34. That Lowell Hatcher worked 8 hours for Colquitt at the Howard University Hospital Project at the wage rate of $9.65 per hour.

35. That the total number of hours worked by employees of Colquitt Sprinkler Company (who are represented for collective bargaining purposes by Local 669) on the Howard University Hospital Project, Contract No. 65-03-B-15676 is 5060 hours.

Respectfully submitted,

O'Donoghue & O'Donoghue

/s/ By Glenn V. Whitaker
Glenn V. Whitaker
1912 Sunderland Place, N.W.
Washington, D.C. 20036
785-2237

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Response to Plaintiffs' Request for Admissions of Fact

Defendants are unable to admit the truth of the facts set forth in Plaintiffs' "Request for Admissions of Fact" served October 30, 1974, because the information available to defendants consists almost entirely of records supplied by Colquitt Sprinkler Co., Inc. (Colquitt), which information or records may be inaccurate as to number of hours or the job on which work was performed by the indicated employees. Based on the amount of work completed at the time of Colquitt's insolvency in relation to claims for compensation made by Colquitt on account of labor and material supplied, there may be substantial discrepancies in these records.

/s/ HENRY J. CAPPELLO
Henry J. Cappello
Attorney for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Request for Admissions as to the Genuineness of Certain Documents

Come now the Plaintiffs, by and through counsel, and hereby request that the Defendants admit or deny that the following documents, exhibited with this request, are genuine to the extent that they are the Contractor's Weekly Payroll Statements submitted by Colquitt Sprinkler Company, Inc. to the General Services Administration and/or J. W. Bateson Company, Inc. and Centex Corporation, A Joint Venture, DBA J. W. Bateson Company, pursuant to Section 4 of Standard Form 19-A incorporated by reference into Construction Contract GS-03B-15676 "NEG":

No.—Date *Description*

1—May 2, 1973—Contractor's Weekly Payroll Statement
2—May 9, 1973—Contractor's Weekly Payroll Statement
3—May 16, 1973—Contractor's Weekly Payroll Statement
4—May 23, 1973—Contractor's Weekly Payroll Statement
5—May 30, 1973—Contractor's Weekly Payroll Statement
6—June 6, 1973—Contractor's Weekly Payroll Statement
7—June 13, 1973—Contractor's Weekly Payroll Statement
8—June 20, 1973—Contractor's Weekly Payroll Statement
9—June 27, 1973—Contractor's Weekly Payroll Statement
10—July 4, 1973—Contractor's Weekly Payroll Statement
11—July 11, 1973—Contractor's Weekly Payroll Statement
12—July 18, 1973—Contractor's Weekly Payroll Statement

13—July 25, 1973—Contractor's Weekly Payroll Statement
14—Aug. 1, 1973—Contractor's Weekly Payroll Statement
15—Aug. 8, 1973—Contractor's Weekly Payroll Statement
16—Aug. 15, 1973—Contractor's Weekly Payroll Statement
17—Aug. 22, 1973—Contractor's Weekly Payroll Statement
18—Aug. 29, 1973—Contractor's Weekly Payroll Statement
19—Sept. 5, 1973—Contractor's Weekly Payroll Statement
20—Sept. 12, 1973—Contractor's Weekly Payroll Statement
21—Sept. 19, 1973—Contractor's Weekly Payroll Statement
22—Sept. 26, 1973—Contractor's Weekly Payroll Statement
23—Oct. 3, 1973—Contractor's Weekly Payroll Statement
24—Oct. 10, 1973—Contractor's Weekly Payroll Statement
25—Oct. 17, 1973—Contractor's Weekly Payroll Statement
26—Oct. 24, 1973—Contractor's Weekly Payroll Statement

Respectfully submitted,

O'Donoghue & O'Donoghue

/s/ By Glenn V. Whitaker
Glenn V. Whitaker
1912 Sunderland Place, N.W.
Washington, D.C. 20036
785-2237
Attorneys for Plaintiffs

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Caption Omitted in Printing)

Defendants' Motion for Summary Judgment

Defendants, by counsel, move this Honorable Court to grant Summary Judgment against plaintiffs for the reasons set forth in the attached memorandum, in consideration of uncontroverted facts as set forth in the attached Statement of Material Facts as to Which There is No Genuine Issue and in consideration of the Affidavit of Lewis L. Pierce, attached hereto. Oral Argument Is Requested.

/s/ Henry J. Cappello
Henry J. Cappello
Attorney for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Affidavit

CITY OF ALEXANDRIA
STATE OF VIRGINIA, SS:

Comes now Lewis L. Pierce, and being duly sworn, deposes and says:

(1) I am President of Pierce Associates, Inc.

(2) Colquitt Sprinkler Company, Inc., (Colquitt) contracted with Pierce Associates, Inc. (Pierce) to provide materials for and installation of a sprinkler system in connection with an addition to Howard University Hospital as alleged in the Complaint herein.

(3) All sums due and owing to Colquitt from Pierce on account of work performed under said contract have been paid; moreover, because it was necessary for Pierce to complete work contracted for by Colquitt as a result of Colquitt's default, and because Colquitt has substantially overbilled the percentage of his work actually completed prior to his unilateral termination of performance, there is owing to Pierce from Colquitt a substantial sum of money chargeable to Colquitt's default and to said overbillings.

(4) There was no privity of contract between the prime contractor, J. W. Bateson Company, Inc., and Colquitt; all of Colquitt's dealings under said contract were directly with Pierce and no others.

(5) That it is the general understanding of contractors engaged in government construction contracting, as Pierce has been engaged for over 13 years, that the Miller Act bond runs to indemnify only persons who supply labor and material to the prime contractor, or to subcontractors in direct privity of contract with the prime contractor.

(6) Under the circumstances of this case, it was Pierce's understanding that it had no obligation to supervise the disbursal of funds paid to Colquitt, because persons dealing with Colquitt knew or should have known that the Miller Act bond would not protect them.

(7) If notified and requested by the plaintiffs' Pierce would have taken steps essential to protect the plaintiffs' entitlement to be paid from funds being paid by Pierce to Colquitt. The normal procedure in such cases would be to issue joint-payee checks to Colquitt and the plaintiffs. Such action, though not a legal obligation, is a common practice with Union contractors to protect their relationship with the building trade unions as a group, to assure continued furnishing of labor and to prevent periodic and disruptive stoppages of work.

(8) At no time prior to December 10, 1973, did Pierce receive notice, either directly or indirectly, that the sums claimed by plaintiffs herein had not been paid. Pierce assumed, in good faith, that all moneys due to employees of Colquitt were being paid when due, as evidenced by the local union continuing to supply men to Colquitt to perform this work. It is a matter of routine, amongst the various union trades in the construction industry, that the local unions withdraw their tradesmen from employers who default in payment of fringe benefits contractually required by the various collective bargaining agreements.

(9) Pierce was aware that Colquitt and plaintiffs had a "Collective Bargaining Agreement" between themselves, and understood, in conformance with common provisions of such agreements, that a surety bond was provided to insure that payment of fringe benefits and union dues would be made by the employer. Pierce was never advised either directly or indirectly prior to December 10, 1973, that plaintiffs had waived this bond in the case of Colquitt.

/s/ LEWIS L. PIERCE
Lewis L. Pierce

(JURAT OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Statement of Material Facts as to Which There is no Genuine Issue Supporting Defendants' Motion for Summary Judgment

1. There is no privity of contract between plaintiffs and defendants; the contract upon which plaintiffs rely to sustain this action was a "Collective Bargaining Agreement" between Colquitt Sprinkler Company, Inc. (Colquitt) and Road Sprinkler Fitters Local Union No. 669 U.A. (Complaint, para. 2).

2. Colquitt was a sub-subcontractor of Pierce Associates, Inc., subcontractor of J. W. Bateson Company, the prime contractor on a United States Government contract for construction of an addition to Howard University Hospital in the District of Columbia. (Complaint, para. 10, 12).

3. Under provisions of the "Collective Bargaining Agreement" Articles 4, 19, 20, 21, and 24, Colquitt was required to withhold from wages of employees represented by Local 669, certain sums for union dues, union welfare fund, union pension fund, union education fund, and employees vacation savings plan, respectively. (Complaint, para. 12).

4. Under provisions of the "Collective Bargaining Agreement", Article 4, "The employer [Colquitt] agrees to deduct Union Membership Dues . . . from the pay of each employee who executes . . . the . . . Check-Off . . . form. Such deductions shall be computed and deducted weekly and remitted to Local Union 669 monthly, not later than the 15th day of each month following the month in which the wages were paid." (Complaint, Exhibit 1 and 2, page 4).

5. Under provisions of Article 19 of the "Collective Bargaining Agreement", an Industry Welfare Fund is recognized together with a Board of Trustees to administer said Fund; the employer (Colquitt) agrees to pay to said Fund forty cent (fifty cents after April 1, 1974) for each hour worked for him by members of Local 699. (Complaint, Exhibits 1 and 2, page 18).

6. Under provisions of Article 20 of the "Collective Bargaining Agreement", an Industry Pension Fund is recognized, together with a Board of Trustees to administer said Fund; the employer (Colquitt) agrees to pay to said Fund sixty cents (seventy cents after April 1, 1974) for each hour worker for him by members of Local 669. (Complaint, Exhibits 1 and 2, p. 19).

7. Under provisions of Article 21 of the "Collective Bargaining Agreement", an Industry Education Fund is recognized, together with a Board of Trustees to administer said Fund; the employer (Colquitt) agrees to pay to said Fund seven cents (eight cents after April 1, 1974) for each hour worked for him by members of Local 669. (Complaint, Exhibits 1 and 2, p. 20).

8. Under provisions of Article 24 of the "Collective Bargaining Agreement" a Vacation Savings Plan is recognized, and the employer (Colquitt) agrees to withhold from Union members wages fifty cents for each hour worked and to deposit, with a designated bank for the individual employee's Vacation Savings Account, the amount of wages withheld, not later than the 15th of the month following the month in which the hours were worked. (Complaint, Exhibits 1 and 2, pages 22-24).

9. The Trustees of each of the Funds referred to in paragraphs 5-7 above, are identical. (Complaint, Caption.)

10. Under provisions of Article 20 of the "Collective Bargaining Agreement," each employer is required to submit contributions to the Welfare, Pension and Educational

Funds "in accordance with rules, regulations, and procedures established by the Trustees . . ." Also each employer "shall furnish to the Union a cash or surety bond in an amount not less than Five Thousand Dollars ($5,000.00) to guarantee contribution for Welfare, Pension, Education, Vacation and Dues in the manner and in the amount required by this Agreement." (Complaint, Exhibits 1 and 2, p. 21).

11. Under provisions of Article 25 of the "Collective Bargaining Agreement", failure to make payments or reports of fringe contributions due and payable gives the Union the right to remove employees from any job or jobs of the Employer or to take other economic action against the employer. (Complaint, Exhibits 1 and 2, pages 24-25).

12. No formal implementation was made of Article 22 of the "Collective Bargaining Agreement" insofar as "rules, regulations, and procedures" being established by the Trustees of the Welfare, Pension and Educational Funds; instead the Trustees "adopted a general guideline that when a contractor is more than two months delinquent in its fringe benefit payments the delinquency is referred to Fund Counsel for legal action." (Ans. Def. Interrogatory #3).

13. The administrator of the Union's Welfare, Education and Pension Funds, James H. Curry, was aware of Colquitt's failure to pay contributions and withholdings when due, i.e., the 15th of the month subsequent to the month for which payments are due. (Ans. Def. Interrogatory #4).

14. Local 699 did not require Colquitt to post a bond to guarantee payments of fringe benefits and union dues as required by Article 22 of the "Collective Bargaining Agreement", and failed to exercise its right to stop work under Article 25 of said Agreement. (Ans. Def. Interrogatories #5 and #7).

15. Plaintiffs were aware that Colquitt was not meeting its obligations to make fringe benefits and dues payments in June 1973, but did not notify Colquitt's contractor, Pierce Associates, Inc., of such non-payment at any time prior to December 10, 1973. The last work performed for Colquitt under the "Collective Bargaining Agreement" occurred on December 1, 1973. (Complaint, para. 14; Ans. Def. Interrogatories #4 and #9).

ROTHWELL, CAPPELLO & BERNDTSON

/s/ By HENRY J. CAPPELLO
Henry J. Cappello
Attorney for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Plaintiffs' Cross-Motion for Summary Judgment

COME Now the Plaintiffs, by and through their attorneys and hereby move this Honorable Court to grant Plaintiffs' Cross-Motion for Summary Judgment against the Defendants for the reasons set forth in the attached memorandum, in consideration of the attached Statement of Material Facts to which there is no genuine issue and in consideration of the Affidavit of Joseph Hajkowski, attached hereto.

Respectfully submitted,

O'DONOGHUE & O'DONOGHUE

/s/ By GLENN V. WHITAKER
Glenn V. Whitaker
1912 Sunderland Place, N.W.
Washington, D.C. 20036
785-2237
Attorneys for Plaintiffs

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Affidavit of Glenn V. Whitaker

DISTRICT OF COLUMBIA: ss

Glenn V. Whitaker, being first duly sworn on oath, deposes and states:

1. That he is counsel for the Plaintiffs in the above captioned case.

2. That on or about December 10, 1973, he notified the Defendant, J. W. Bateson Company, by letter of the Plaintiffs' claim on the payment bond furnished by Bateson pursuant to the provisions of the Miller Act, 40 U.S.C. § 270b(a). The return receipt and letter from Bateson acknowledging receipt of the notice are attached.

/s/ GLEN V. WHITAKER
Glenn V. Whitaker

(JURAT OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Affidavit of Joseph Hajkowski

DISTRICT OF COLUMBIA: ss

Joseph Hajkowski, being first duly sworn on oath, deposes and states:

1. That the affiant is Chairman of the Boards of Trustees of the National Automatic Sprinkler Industry Pension Fund, the National Automatic Sprinkler Industry Welfare Fund and the National Automatic Sprinkler Local 669, U.A. Educational Fund located at P.O. Box 1925, Silver Spring, Maryland 20902. The Trustees of the Funds are as follows:

National Automatic Sprinkler Industry Pension Fund

Joseph Hajkowski, Thomas W. Hanna,
Thomas J. Devlin — Union Trustees

Raymond J. Casey, Richard D. Sullivan
Maurice Bernier — Employer Trustees

National Automatic Sprinkler Industry Welfare Fund

Joseph Hajkowski, Thomas W. Hanna
Clyde C. Cleare — Union Trustees

Raymond J. Casey, Richard D. Sullivan
Maurice Bernier — Employer Trustees

National Automatic Sprinkler Local 669,
U.A. Educational Fund

Joseph Hajkowski, Thomas W. Hanna
Kenneth G. Hollaway — Union Trustees

Raymond J. Casey, Richard D. Sullivan
Maurice Bernier — Employer Trustees

Mr. Raymond J. Casey is Co-Chairman of the three Funds.

2. That the affiant is President of Road Sprinkler Fitters Local Union No. 669, U.A. (hereinafter "Local 669") located at 7411 Riggs Road, Adelphi, Maryland 20783. Local 669 is an unincorporated labor organization representing sprinkler fitters employed by sprinkler contractors throughout the United States.

3. That the National Automatic Sprinkler Industry Pension Fund, the National Automatic Sprinkler Industry Welfare Fund and the National Automatic Sprinkler Local 669, U.A. Educational Fund (hereinafter "Sprinkler Funds") are employee fringe benefit trust funds established for the benefit of employees represented by Local 669 pursuant to Articles 19, 20, and 21 of the collective bargaining agreement between the National Automatic Sprinkler and Fire Control Association (hereinafter the "Association") and Local 669.

4. That Colquitt Sprinkler Company, Inc. (hereinafter "Colquitt") is a party to the collective bargaining agreement referred to above. Because Colquitt is not a member of the Association, it was necessary for Colquitt to sign separately in order to be bound by the provisions of the agreement between the Association and Local 669. (A copy of the agreement and signed assent is attached to the Complaint as Exhibit 1 and 2.)

5. That pursuant to Articles 19, 20 and 21 of its collective bargaining agreement with Local 669, Colquitt was required effective April 1, 1973, to pay for each of its employees represented by Local 669, $0.40 per hour to the N.A.S.I. Welfare Fund, $0.60 per hour to the N.A.S.I. Pension Fund, and $0.07 per hour to the N.A.S. Local 669, U.A. Educational Fund; that pursuant to Article 24 of the

collective bargaining agreement with Local 669, Colquitt was required to withhold from the wages of each of its employees represented by Local 669 the sum of $0.50 per hour for each hour worked by its employees and submit this withheld money to a Vacation Fund maintained by the Riggs National Bank; that pursuant to Article 4 of the collective bargaining agreement with Local 669, Colquitt was required to withhold from the wages of each of its employees represented by Local 669 who executed an "Authorization for Check-Off of Work Assessment" form, union membership dues in the amount of 1½% of the employee's gross wages and to forward this money to Road Sprinkler Fitters Local Union No. 669.

6. That during the period May 1, 1973 through October 1973, several persons represented by Local 669 were regularly employed by Colquitt at the Howard University Hospital job site and were engaged at Colquitt's special instance and request in the installation of a fire sprinkler system in the hospital building.

7. That the general contractor on the Howard University Hospital building was J. W. Bateson Company, and it was Local 669's understanding that Colquitt was one of many subcontractors employed on the job doing work which was an integral part of the contract between the General Services Administration and J. W. Bateson Company.

8. That during the period May 1, 1973 through October, 1973 [in late October, 1973, the last of the labor was performed on the Howard University Hospital job by employees of Colquitt who were represented by Local 669], Colquitt failed to make any payments to the Sprinkler Funds or to forward to Local 669 or the Riggs National Bank any monies withheld from the wages of its employees who worked many hours on the Howard University Hospital project at Colquitt's special instance and request.

9. That during the period May 1, 1973 through October, 1973, Colquitt failed to make payments to the Sprinkler Funds or forward to Local 669 or the Riggs National Bank monies withheld from the wages of its employees even though Colquitt had in its employ several persons represented by Local 669 who worked many hours on a variety of jobs throughout the Washington metropolitan area (other than and in addition to the Howard University Hospital project).

10. That pursuant to the provisions of Article 22 of the collective bargaining agreement between the Association and Local 669 (to which Colquitt is a party), the Trustees of the Welfare, Pension and Educational Funds are permitted to institute and participate in legal proceedings to collect payments or contributions from an employer which has not made such payments on time. That Article 22 also states that any employer which is a party to the collective bargaining agreement shall furnish to the Union a cash or surety bond in an amount not less than $5,000.00 to guarantee payments to the Sprinkler Funds and vacation and dues payments.

11. That Article 25 of the agreement excludes from the grievance procedure and arbitration, a violation of the agreement by an employer involving his failure to pay or report fringe contributions due and payable under the agreement. That Local 669 has the right "to remove employees from any job or jobs of the Employer or to take other legal economic action against the Employer" when a violation such as that described above has occurred.

12. That Articles 22 and 25 of the collective bargaining agreement are not intended either expressly or impliedly to waive any of the statutory or other legal rights of those persons represented by Local 669 and the Trustees of the Sprinkler Funds in the present law suit. That no authorized agent of Local 669 or any Trustee or agent of the Sprinkler Funds has signed any waiver or expressed any intention to

anyone to sign or agree to a waiver of the statutory or other legal rights of the persons who are represented by Local 669 and the Trustees of the Sprinkler Funds in the present law suit. That the surety bond and the right to strike provided for in Articles 22 and 25 are merely additional security measures designed to avoid the necessity of legal action to collect unpaid monies. That enforcement or non-enforcement of the surety bond provision in Article 22 and implementation or non-implementation of the right to strike in Article 25 do not in any way affect an employer's obligations under the collective bargaining agreement to make payments to the Sprinkler Funds and to forward to Local 669 and the Riggs National Bank monies withheld from employees' wages. That Article 22 specifically refers to the Trustees' right to institute legal proceedings to collect from an employer monies owed to the Sprinkler Funds.

13. That the bond and right to strike provisions contained in Articles 22 and 25 were not included in the collective bargaining agreement as a recognition by Local 669 or the Association that the Miller Act would not cover persons like those on whose behalf the present action was instituted. That the bond and right to strike provisions were as previously stated, included in the agreement as additional security measures to insure that employers would comply with their financial obligations under the agreement.

14. That Colquitt has been a party to several agreements with Local 669 during the past years and Colquitt has always been able to pay wages and fringe benefits to its employees without problems. That Colquitt made repeated promises to pay during the period of its delinquency which were initially honored by the Trustees and Local 669 because of Colquitt's reasonably good record as an employer. That Colquitt's delinquency was not discovered by the Sprinkler Funds and Local 669 until late June, 1973, and

pursuant to the Trustees' general rule that delinquencies are allowed to run for two months before being referred to legal counsel for collection, no decision was made with respect to Colquitt's delinquency until late July or early August, 1973. That legal action was delayed because of Colquitt's repeated promises to pay.

14. That the surety bond provision contained in Article 22 of the collective bargaining agreement was a new provision which had never before been a part of the agreements to which the Association or Colquitt were parties. That neither Local 669 nor the Association (which negotiated the agreement) expected that the bond provision could be implemented immediately with respect to every employer member of the Association or every independent employer like Colquitt. That employers experienced problems with obtaining bonding companies which were willing to write the bonds and that these problems caused delay.

15. That when Local 669 obtained Colquitt's signature on the assent to be bound by the terms of the collective bargaining agreement, the Local did not immediately press Colquitt to post a cash or surety bond. That the employment situation in the Washington metropolitan area was very bad during 1973 and that Local 669 was more interested in signing Colquitt and insuring that Colquitt's employees who were represented by Local 669 could remain employed than the Local was interested in requiring Colquitt to implement the bond provision. That in any event, Local 669 recognized that it would take some time after Colquitt was signed to the agreement before Colquitt could obtain a bond.

16. That when Local 669 later decided to press Colquitt for a bond, it was obvious that Colquitt's financial situation was such that it would be impossible for Colquitt to issue a cash bond or to obtain a bond from any bonding company. That Local 669 did not at any time expressly or

impliedly waive implementation of the bond provision with respect to Colquitt.

17. That the Trustees of the Sprinkler Funds and/or Local 669 did not at any time agree to notify any of the Defendants or Pierce Associates, Inc. with respect to any delinquency in Colquitt's payments to the various Funds and the Local.

/s/ JOSEPH HAJKOWSKI
Joseph Hajkowski

(JURAT OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Plaintiffs' Statement of Material Facts

1. Road Sprinkler Fitters Local Union No. 669, U.A. (hereinafter "Local 669"), located at 7411 Riggs Road, Adelphi, Maryland 20783 is an unincorporated labor organization representing sprinkler fitters employed by sprinkler contractors throughout the United States (Affidavit of Mr. Joseph Hajkowski, ¶ 2).

2. The National Automatic Sprinkler Industry Pension Fund, the National Automatic Sprinkler Industry Welfare Fund and the National Automatic Sprinkler Local 669, U.A. Educational Fund (hereinafter "Sprinkler Funds") are employee fringe benefit trust funds established for the benefit of employees represented by Local 669 pursuant to Articles 19, 20, and 21 of the collective bargaining agreement between the National Automatic Sprinkler and Fire Control Association (hereinafter the "Association") and Local 669 (Affidavit of Joseph Hajkowski, ¶ 3).

3. Colquitt Sprinkler Company, Inc. (hereinafter "Colquitt") is a party to the collective bargaining agreement referred to above. Because Colquitt is not a member of the Association, it was necessary for Colquitt to sign separately in order to be bound by the provisions of the agreement between the Association and Local 669 (Affidavit of Joseph Hajkowski, ¶ 4).

4. Pursuant to Articles 19, 20, and 21 of its collective bargaining agreement with Local 669, Colquitt was required effective April 1, 1973, to pay for each of its employees represented by Local 669, $0.40 per hour to the N.A.S.I. Welfare Fund, $0.60 per hour to the N.A.S.I. Pension Fund, and $0.07 per hour to the N.A.S. Local 669,

U.A. Educational Fund; pursuant to Article 24 of the collective bargaining agreement with Local 669, Colquitt was required to withhold from the wages of each of its employees represented by Local 669 the sum of $0.50 per hour for each hour worked by its employees and submit this withheld money to a Vacation Fund maintained by the Riggs National Bank; pursuant to Article 4 of the collective bargaining agreement with Local 669, Colquitt was required to withhold from the wages of each of its employees represented by Local 669 who executed an "Authorization for Check-Off of Work Assessment" form, union membership dues in the amount of 1½% of the employee's gross wages and to forward this money to Road Sprinkler Fitters Local Union No. 669 (Affidavit of Joseph Hajkowski, ¶ 5).

5. During the period May 1, 1973 through October, 1973, several persons represented by Local 669 were regularly employed by Colquitt at the Howard University Hospital project job site and were engaged at Colquitt's special instance and request in the installation of a fire sprinkler system in the hospital building (Affidavit of Joseph Hajkowski, ¶ 6).

6. The Howard University Hospital project was a federal project on which the J. W. Bateson Company was the prime or general contractor. On or about August 10, 1971, Bateson entered into a written contract with the United States, acting by and through the General Services Administration for the construction of an addition to the Howard University Hospital, being Contract No. G5-03-B-150676 (Answer of Defendants—Sixth Defense).

7. On August 12, 1971, Bateson along with the Defendant sureties, duly executed and delivered to the United States Government a payment bond for the protection of all persons supplying labor and materials in the prosecution of the work provided for in Contract No. G5-03-B-15676; the bond was duly executed in accordance with the

provisions of Title 40 of the United States Code, Section 270a in the sum of $2,500,000.00 (Answer of Defendants—Sixth Defense; 40 U.S.C. § 270a).

8. Colquitt was a subcontractor on the Howard University Hospital project and was engaged in the supply of materials for and the installation of a fire sprinkler system, work which was specifically required by and was an integral part of Contract No. G5-03-B-15676 between Bateson and the General Services Administration (Affidavit of Joseph Hajkowski, ¶ 7; Order of July 3, 1974; Section 1551 of Contract No. G5-03-B-15676 supplied by the Defendants).

9. During the period May 1, 1973 through October, 1973 Colquitt failed to make any payments to the Sprinkler Funds or to forward to Local 669 or the Riggs National Bank any monies withheld from the wages of its employees who worked many hours on the Howard University Hospital project at Colquitt's special instance and request (Affidavit of Joseph Hajkowski, ¶ 9).

10. During the period May 1, 1973 through October, 1973, Colquitt failed to make payments to the Sprinkler Funds or forward to Local 669 or the Riggs National Bank monies withheld from the wages of its employees even though Colquitt had in its employ several persons represented by Local 669 who worked many hours on a variety of jobs throughout the Washington metropolitan area (other than and in addition to the Howard University Hospital project). (Affidavit of Joseph Hajkowski, ¶ 9).

11. Pursuant to the provisions of Article 22 of the collective bargaining agreement between the Association and Local 669 (to which Colquitt is a party), the Trustees of the Welfare, Pension and Educational Funds are permitted to institute and participate in legal proceedings to collect payments or contributions from an employer which has not made such payments on time. Article 22 also states that any employer which is a party to the collective bar-

gaining agreement shall furnish to the Union a cash or surety bond in an amount not less than $5,000.00 to guarantee payments to the Sprinkler Funds and vacation and dues payments (Affidavit of Joseph Hajkowski, ¶ 10).

12. Article 25 of the agreement excludes from the grievance procedure and arbitration, a violation of the agreement by an employer involving his failure to pay or report fringe contributions due and payable under the agreement. Local 669 has the right "to remove employees from any job or jobs of the Employer or to take other legal economic action against the Employer" when a violation such as that described above has occurred (Affidavit of Joseph Hajkowski, ¶ 11).

13. Articles 22 and 25 of the collective bargaining agreement are not intended either expressly or impliedly to waive any of the statutory or other legal rights of those persons represented by Local 669 and the Trustees of the Sprinkler Funds in the present law suit. No authorized agent of Local 669 or any Trustee or agent of the Sprinkler Funds has signed any waiver or expressed any intention to anyone to sign or agree to a waiver of the statutory or other legal rights of the persons who are represented by Local 669 and the Trustees of the Sprinkler Funds in the present law suit. The surety bond and the right to strike provided for in Articles 22 and 25 are merely additional security measures designed to avoid the necessity of legal action to collect unpaid monies. Enforcement or non-enforcement of the surety bond provision in Article 22 and implementation or non-implementation of the right to strike in Article 25 do not in any way affect an employer's obligations under the collective bargaining agreement to make payments to the Sprinkler Funds and to forward to Local 669 and the Riggs National Bank monies withheld from employees' wages. Article 22 specifically refers to the Trustees' right to institute legal proceedings to collect

from an employer monies owed to the Sprinkler Funds (Affidavit of Joseph Hajkowski, ¶ 12).

14. The bond and right to strike provisions contained in Articles 22 and 25 were not included in the collective bargaining agreement as a recognition by Local 669 or the Association that the Miller Act would not cover persons like those on whose behalf the present action was instituted. The bond and right to strike provisions were, as previously stated, included in the agreement as additional security measures to insure that employers would comply with their financial obligations under the agreement (Affidavit of Joseph Hajkowski, ¶ 13).

15. The surety bond provision contained in Article 22 of the collective bargaining agreement was a new provision which had never before been a part of the agreements to which the Association or Colquitt were parties. Neither Local 669 nor the Association (which negotiated the agreement) expected that the bond provision could be implemented immediately with respect to every employer member of the Association or every independent employer like Colquitt. Employers experienced problems with obtaining bonding companies which were willing to write the bonds, and these problems caused delay (Affidavit of Joseph Hajkowski, ¶ 14).

16. The Trustees of the Sprinkler Funds and/or Local 669 did not at any time agree to notify any of the Defendants or Pierce Associates, Inc. with respect to any delinquency in Colquitt's payments to the various Funds and the Local (Affidavit of Joseph Hajkowski, ¶ 17).

17. On or about December 10, 1974, the Defendants were served with statutory notice of the Plaintiffs' claim against the Miller Act payment bond issued by Bateson and its sureties (Affidavit of Glenn V. Whitaker).

For its response to the Defendants' Statement of Material Facts, the Plaintiffs state as follows:

1. Privity of contract as referred to in paragraph 1 of Defendants' statement of facts is immaterial to the present action.

2. Defendants' reference to Colquitt as a "sub-subcontractor" in paragraph 2 of their statement of facts is immaterial in that the Court has ruled on two occasions that Colquitt was a "subcontractor" within the meaning of the Miller Act.

3. Defendants' claim in paragraph 9 of their statement of facts that the Trustees of the various Funds are identical is incorrect (Affidavit of Joseph Hajkowski, ¶ 1).

4. Paragraph 12 of the Defendants' statement of material facts is irrelevant and immaterial.

5. Paragraph 13 of the Defendants' statement of material facts is irrelevant and immaterial.

6. Paragraph 14 of the Defendants' statement of material facts is irrelevant and immaterial.

7. The first sentence of Paragraph 15 of the Defendants' statement of material facts is irrelevant and immaterial.

Respectfully submitted,

O'Donoghue & O'Donoghue

/s/ By Glenn V. Whitaker
Glenn V. Whitaker
1912 Sunderland Place, N.W.
Washington, D.C. 20036
785-2237
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-699

THE BOARDS OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, et al.,
Plaintiffs

v.

J. W. BATESON COMPANY, et al., *Defendants*

(FILED JUNE 6, 1975)

Order

Upon consideration of the Defendants' motion for summary judgment, the attached memorandum and affidavit and the Plaintiffs' cross-motion for summary judgment, the attached memorandum and affidavit, it is hereby ORDERED this 6th day of June, 1975, that:

1. The Defendants' motion for summary judgment be denied; and

2. The Plaintiffs' cross-motion for summary judgment be granted.

/s/ AUBREY E. ROBINSON, JR.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Notice of Appeal

Notice is hereby given that J. W. Bateson Company, Inc. and Centex Corporation, a Joint Venture, d/b/a J. W. Bateson Company, The Aetna Casualty and Surety Company, American Re-Insurance Company, Employers Re-Insurance Corporation, General Reinsurance Corporation and The Home Insurance Company, defendants hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the Order denying defendants' motion for summary judgment and granting plaintiffs' cross-motion for summary judgment, entered in this action on the 6th day of June, 1975.

ROTHWELL, CAPPELLO & BERNDTSON

/s/ By HENRY J. CAPPELLO
Henry J. Cappello
Attorney for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(CAPTION OMITTED IN PRINTING)

Motion to Dismiss Appeal

COME Now the Plaintiffs-Appellees Boards of Trustees of the National Automatic Sprinkler Industry Pension Fund, the National Automatic Sprinkler Industry Welfare Fund, the National Automatic Sprinkler Local 669, U.A. Educational Fund, and Road Sprinkler Fitters Local Union No. 669, U.A., by and through their attorneys, and hereby move this Court to dismiss the appeal in the above-captioned case on the ground that the appeal is not within the jurisdiction of this Court because the order sought to be reviewed is neither a final judgment under 28 U.S.C. § 1291 nor an appealable interlocutory order under 28 U.S.C. § 1292.

Respectfully submitted,

O'DONOGHUE & O'DONOGHUE

/s/ By GLENN V. WHITAKER
Glenn V. Whitaker
1912 Sunderland Place, N.W.
Washington, D.C. 20036
785-2237

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

No. 75-1761

UNITED STATES OF AMERICA, et al.

v.

J. W. BATESON COMPANY, INC., et al.

BEFORE: McGowan and Leventhal, Circuit Judges

(FILED OCTOBER 24, 1975)

Order

On consideration of appellee's unopposed motion to dismiss appeal, it is

ORDERED by the Court that the aforesaid motion is granted and this appeal is dismissed.

The Clerk is directed to transmit a certified copy of this order to the District Court as promptly as the business of this office permits.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Motion to Certify for Appeal Pursuant to 28 U.S.C. 1291-1292

Defendants, by counsel, with the concurrence of plaintiffs, hereby move this Honorable Court to certify this case for interlocutory appeal pursuant to 28 U.S.C. §§ 1291-1292 for the reasons set forth in the attached Memorandum of Points and Authorities.

Respectfully submitted,

ROTHWELL, CAPPELLO & BERNDTSON

/s/ By HENRY J. CAPPELLO
Henry J. Cappello
Attorneys for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

SEEN AND APPROVED:

O'DONOGHUE & O'DONOGHUE

/s/ By GLENN V. WHITAKER
Glenn V. Whitaker
Attorney for Defendants
1912 Sunderland Place, N.W.
Washington, D.C. 20036
785-2237

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-699

UNITED STATES OF AMERICA for and on behalf of the BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY WELFARE FUND, et al., *Plaintiffs*

v.

J. W. BATESON COMPANY, et al., *Defendants*

(FILED OCTOBER 29, 1975)

Order

Upon Motion of defendants, concurred in by plaintiffs, and it appearing to the Court that the determination of the Court heretofore granting Summary Judgment to plaintiff involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation, it is by the Court this 29th day of October, 1975,

ORDERED, ADJUDGED AND DECREED that this matter be, and the same hereby is, certified for appeal to the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. §§ 1291-1292, and the proceedings herein are stayed pending determination of said Appeal.

/s/ AUBREY E. ROBINSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(CAPTION OMITTED IN PRINTING)

Notice of Appeal

Notice is hereby given that J. W. Bateson Company, Inc. and Centex Corporation, a Joint Venture d/b/a J. W. Bateson Company, The Aetna Casualty and Surety Company, American Re-Insurance Company, Employers Re-Insurance Company, defendants, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the Order denying defendants' motion for summary judgment and granting plaintiffs' cross-motion for summary judgment, entered in this action on the 6th day of June, 1975.

This case was certified for appeal pursuant to 28 U.S.C. §§ 1291-1292 by this Court on October 29, 1975, by United States District Judge Aubrey E. Robinson, Jr.

ROTHWELL, CAPPELLO & BERNDTSON

/s/ By HENRY J. CAPPELLO
Henry J. Cappello
Attorneys for Defendants
1225 - 19th Street, N.W.
Washington, D.C. 20036
785-5025

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

Civil 74-699
No. 75-2199

UNITED STATES OF AMERICA for and on behalf of the BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, et al.

v.

J. W. BATESON COMPANY, INC., et al., *Appellants*

Appeal from the United States District Court
for the District of Columbia.

BEFORE: Wright and Robb, Circuit Judges and Gesell,* United States District Judge for the District Court for the District of Columbia.

(FILED JANUARY 28, 1977)

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.[1]

Per Curiam
FOR THE COURT:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date: January 28, 1977
Opinion for the Court filed by District Judge Gesell.
Concurring opinion filed by Circuit Judge Wright.

[1] The opinion of the Court of Appeals and concurring opinion are printed in full in the petition for writ of certiorari file herein.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

Civil 74-699
No. 75-2199

UNITED STATES OF AMERICA, et al.

v.

J. W. BATESON COMPANY, INC., and
CENTEX CORP., et al., *Appellants*

BEFORE: Wright and Robb, Circuit Judges; and Gesell,* United States District Judge for the United States District Court for the District of Columbia.

(FILED FEBRUARY 16, 1977)

Order

On consideration of the petition for rehearing filed by appellants, it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Per Curiam
FOR THE COURT:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

Civil 74-699
No. 75-2199

UNITED STATES OF AMERICA, et al.

v.

J. W. BATESON COMPANY, INC., and
CENTEX CORP., et al., *Appellants*

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

(FILED FEBRUARY 16, 1977)

Order

The suggestion for rehearing *en banc* filed by appellants having been transmitted to the full Court, and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court, *en banc*, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

SUPREME COURT OF THE UNITED STATES

No. 76-1476

J. W. BATESON COMPANY, INC., et al., *Petitioners,*

v.

UNITED STATES EX REL. BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, et al.

ORDER ALLOWING CERTIORARI.

Filed June 27, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Supreme Court, U. S.
FILED
MAY 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1476

J. W. BATESON COMPANY, INC., *et al.*, *Petitioners*

v.

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, *et al.*, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DONALD J. CAPUANO
PATRICK C. O'DONOGHUE
JOYCE A. MADER
O'DONOGHUE & O'DONOGHUE
1912 Sunderland Place, N.W.
Washington, D.C. 20036
Attorneys for Respondents

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1476

J. W. BATESON COMPANY, INC., *et al., Petitioners*

v.

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, *et al., Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW AND JURISDICTION

In denying the Motion to Dismiss the District Court issued an unreported opinion reproduced at p. 1a, *infra*. The Court of Appeals' opinion is reproduced at pp. 1a-6a of the Petition for Certiorari (hereafter

"Pet."). (However, contrary to the requirements of Rule 23(1)(j), the Petition omits to reproduce the judgment of the court below and the order denying rehearing.)

QUESTIONS PRESENTED

Did the courts below correctly determine that an employer whose default gave rise to a claim under the Miller Act, 40 U.S.C. § 270a *et seq.* had a "substantial and important" relationship with the prime contractor and was therefore a "subcontractor" for purposes of that Act as construed in *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 123?

COUNTERSTATEMENT

Certain essential facts on which the decision below turned were omitted in petitioners' Statement of the Case. They are set forth in the portion of the Court of Appeals' opinion which is quoted at p. 3, *infra*.

REASONS FOR DENYING THE WRIT

Three terms ago, in *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116 (hereafter "*Rich*"), this Court unanimously declared that in determining coverage under the Miller Act the "test for whether one is a subcontractor [is] the substantiality and importance of his relationship with the prime contractor" (*id.* at 123). The decision below merely applied that standard to the particular facts of this case. The Court of Appeals determined that the District Court had correctly "found the relationship between Bateson and Colquitt to be 'substantial and important'" (Pet. 5a). A petition for rehearing *en banc* was denied without dissent. No further review of this conclusion is warranted.

ARGUMENT

A. In contending that the Court of Appeals misinterpreted the decisions in *Rich* and its predecessor, *MacEvoy* v. *United States*, 322 U.S. 102 (Pet. 9-11), petitioners omit to state the critical facts on which the courts below based their conclusion. The Court of Appeals said:

> "Colquitt was installing a sprinkler system in the addition to the hospital. The work was specifically required by Bateson's contract with the Government and was an integral and significant part of that contract. The importance of this work is evidenced by the fact that Pierce itself hired Colquitt's employees to finish the job when Colquitt because of its financial difficulties could no longer perform.
>
> The District Court found the relationship between Bateson and Colquitt 'substantial and important'. This is borne out by the nature of the work and the fact that it was performed over a substantial period of time. Moreover, it appears from the record that copies of Colquitt's payroll statement were submitted to Bateson. Since Colquitt's work was part of the main contract, was performed on the job site, and was of such obvious importance, Bateson was in a position to protect itself from Colquitt's default by obtaining security through bond or otherwise." (Pet. 4a-5a, footnote omitted.)

See also *id.* at 3a, quoting 417 U.S. at 123.

While petitioners object that "[i]t is no answer to say, as did the Court of Appeals, that Bateson could have protected itself from Colquitt's default" (Pet. 13), the Court's "answer" focuses on the precise point of principle which underlies the test for coverage un-

der the Miller Act. As was said in *Rich*: "It is the substantiality of the relationship which will usually determine whether the prime contractor can protect himself, since he can easily require bond security or other protection from those few 'subcontractors' with whom he has a substantial relationship in the performance of the contract." (417 U.S. at 123-24.) But since, as the Court determined in *MacEvoy*, "this method of protection [a security bond] is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman, who may be a manufacturer, a wholesaler or a retailer" (322 U.S. at 110), the claim there, brought by a materialman of a materialman, was "too remote * * * to enjoy the protections of the Act" (*Rich*, 417 U.S. at 122).

Thus, the Miller Act's "remoteness" limitation calls for a practical rather than a "formalistic analysis" (Pet. 4a). Its purpose is to avoid imposing liability on prime contractors for consequences against which they are unable to protect themselves. But when they *can* protect themselves there is no interest which countervails "the Congressional intent to protect those whose labor and materials go into public projects (*Rich*, 417 U.S. at 124, quoting *MacEvoy*, 322 U.S. at 107). See also *Hill* v. *American Surety Co.*, 200 U.S. 197, 204, which held that the predecessor statute, the Heard Act,[1] clearly evidenced "the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work."

Nevertheless, petitioners would substitute for the principled "substantial relationship" test the requirement of a "direct contractual relationship" (Pet. 2). But this mechanistic view not only ignores the quoted holding of *Rich*, but fails to take account of the difference in the results in the cases. For, the successful claimant in *Rich* was not more "remote" in terms of petitioners' analysis than was the unsuccessful claimant in *MacEvoy;* both were at two removes from the prime contractor. Petitioners' attribution of technical notions of privity to Congress on the basis of the legislative history quoted at Pet. 12 is likewise unsound: A "sub-subcontractor" who, as was there explained, *would* be entitled to recover, is no less "remote" in terms of petitioners' technical approach than the party who was found too remote in *MacEvoy*.

[1] Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by Act of February 24, 1905, c. 778, 33 Stat. 811.

B. Attention to the facts in this case also forecloses petitioners' claim of a conflict among the circuits. They say: "The United States Courts of Appeals for the First, Fourth, Fifth and Ninth Circuits have all held that a third tier subcontractor *(respondents in this case)* is too remote to be entitled to recover on a Miller Act bond." (Pet. 8, footnote omitted.) But unlike the claimants in the cases cited by petitioners (*id.* n. 1), respondents simply are not "third tier subcontractors"; they are the trustees of an employee benefit fund who stand in the shoes of the employees[2] of a subcontractor who "perform[ed] and [took] from the prime contractor a specific part of the labor or material requirements of the original contract" (*Rich, supra*, 417 U.S. at 123, quoting from *MacEvoy*, 322 U.S. at 110)—to wit, "installing a sprinkler system [which] was specifically required by [the prime contractor's] contract with the Government * * *" (Pet. App. 5a).

[2] *United States* v. *Carter*, 353 U.S. 210.

Moreover, petitioners overlook the critical circumstance that all of the cases which they cite antedate *Rich*. Thus, even if the facts in those cases were identical to the facts here, there would be no likelihood of a contrariety of results in the future. Henceforth the other courts of appeals will of course be guided, as was the court below, by this Court's construction of the Act in *Rich*, rather than by their own pre-*Rich* precedents.

C. In straining to attribute novelty and importance to the decision below, petitioners exaggerate its narrow reach, and, at the end, distort the basic theory of the statute.

Petitioners' assertion that because of the decision below "it will now be necessary for each subcontractor to require bonds from each sub-subcontractor on down the line *ad infinitem* to obtain full protection from unknown claimants" (Pet. 13), ignores the limitation inherent in the particularistic findings at Pet. 4a-5a on which the decision is based. Since it cannot be said that Colquitt or Colquitt's employees who installed sprinkler fitters "over a substantial period of time" and "on the job site" (Pet. 5a) were "unknown" to the prime contractor, the decision below establishes no precedent for liability where claimants *are* "unknown".[3]

[3] Petitioners' avowed fear that the decision below "will upset traditional relationships between contractors on Government construction projects" (Pet. 12, initial caps omitted) is wholly unjustified. It has not been the experience of the employer and union trustees of respondent Fund that enterprises in the construction industry structure their relationships in order to place the loss resulting from contractor defaults on their innocent employees; but if that were the practice, and the decision below tended to undermine it, the rightness of that result and of this Court's construction of the Miller Act in *Rich* would be further vindicated.

That the prime contractor made a mistake of law in connection with this project which commenced in 1971 (Pet. 2a), does not warrant the granting of certiorari. Prime contractors now know, even if they did not know before *Rich* and the decision below, that they should, if they can, purchase protection for themselves and security from loss for those whose "substantial and important" contribution to a public project benefits the prime contractor—and ultimately the United States. To be sure, this will, as petitioners say, create additional premium expenses, "and will ultimately result in an increase in the cost of construction to the Government" (Pet. 14).

Petitioners thus come down to the proposition that the potential added premium cost is a matter of sufficient importance to warrant review by this Court. We submit that the very suggestion is "a tacit slander of the Nation's credit".[4] In any event, it reverses the actual Congressional order of priorities embodied in this legislation, without which there would be no bond requirement and no premium expense whatsoever.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DONALD J. CAPUANO
PATRICK C. O'DONOGHUE
JOYCE A. MADER
O'DONOGHUE & O'DONOGHUE
1912 Sunderland Place, N.W.
Washington, D.C. 20036
Attorneys for Respondents

[4] The phrase is that of Jackson, J. dissenting in a tax case, *Lykes* v. *United States*, 343 U.S. 118, 129.

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, *et al.*, *Plaintiffs*,

v.

J. W. BATESON COMPANY, INC., *Defendant*.

Civil Action No. 74-699

Filed July 3, 1974

ORDER

Upon consideration of Defendant's Motion to Dismiss, the Opposition thereto, and the entire record herein, it appearing to the Court that the definition of a "subcontractor" as used in Section 270b(a) of the Miller Act, 40 U.S.C. § 270b(a), is a "functional rather than a technical definition" *F.D. Rich Co., Inc.* v. *United States*, — U.S. — 42 U.S.L.W. 4783, 4785 and that it is the nature of the relationship of the parties which is therefore controlling rather than any label such as "third-tier" or otherwise, and it further appearing that the relationship of the Colquitt Sprinkler Company to the J. W. Bateson Company herein was both substantial and important, and that Colquitt Sprinkler Company is therefore a subcontractor herein within the meaning of the Miller Act, now therefore, it is this 3rd day of July, 1974;

ORDERED that the Motion to Dismiss be and hereby is DENIED.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

Supreme Court, U. S.
FILED
AUG 11 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1476

J. W. BATESON COMPANY, INC., et al., *Petitioners*

v.

UNITED STATES OF AMERICA for and on behalf of the Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR PETITIONERS

JACK REPHAN
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorney for Petitioners

Of Counsel:
DANZANSKY, DICKEY, TYDINGS,
QUINT & GORDON
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

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IN THE

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OCTOBER TERM, 1976

No. 76-1476

J. W. BATESON COMPANY, INC., et al., *Petitioners*

v.

UNITED STATES OF AMERICA for and on behalf of the Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals is reported at 551 F. 2d 1284.[1]

[1] The opinion of the Court of Appeals is also printed in full in the appendix to the petition for a writ of certiorari filed herein, pp. 1a-6a.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on January 28, 1977 (A. 64). A timely petition for rehearing, or, in the alternative for hearing *en banc*, was denied on February 16, 1977 (A. 4, 66). The petition for a writ of certiorari was filed on April 25, 1977, and certiorari was granted on June 27, 1977 (A. 68). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Whether union trustees, seeking recovery of unpaid fringe benefit funds and union dues required to be withheld under a collective bargaining agreement from the wages of employees of a sub-subcontractor on a federal construction project, may sue to recover such monies under the Miller Act, 40 U.S.C. § 270a, *et seq.*, where neither the union trustees nor the employees of the sub-subcontractor have any direct contractual relationship with either the prime contractor or a subcontractor of the prime contractor.

2. Whether the Court of Appeals' decision, extending the coverage of the Miller Act to union trustees who have no contractual relationship with either the prime contractor or a subcontractor, which decision is in conflict with the decisions of the Courts of Appeals for the First, Fourth, Fifth and Ninth Circuits, has misinterpreted this Court's opinions in *Clifford F. MacEvoy Co.* v. *United States ex. rel. Calvin Tomkins Co.* and *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*

STATUTE INVOLVED

The Miller Act, 40 U.S.C. § 270b(a), as amended, provides:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Section 270a of this title and who has not been paid in full therefore before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is due, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, that any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshall of the district in which the public improvement is situated is authorized by law to serve summons."

STATEMENT OF THE CASE

1. *Material Facts.* On or about August 10, 1971, petitioner, J. W. Bateson Company (hereinafter "Bateson"), entered into a written prime contract with the United States of America, acting by and through the General Services Administration, for the construction of an addition to the Howard University Hospital building in the District of Columbia (A. 4, 7, 26, 52).

On August 12, 1971, Bateson, in conjunction with the other named petitioner sureties, duly executed and delivered to the United States a payment bond (hereinafter "Miller Act bond") in accordance with the provisions of the Miller Act, 40 U.S.C. § 270a, *et seq.*, as amended, in the sum of $2,500,000.00, to protect the class of persons, within the contemplation of the statute, who furnish labor or materials for a government construction project (A. 7, 8, 16-18, 52).

Thereafter, Bateson entered into a subcontract with Pierce Associates, Inc. (hereinafter "Pierce"), which subcontract obligated Pierce to perform a portion of the work specified in the original contract between Bateson and the United States (A. 8, 38). Subsequently, Pierce entered into a sub-subcontract with Colquitt Sprinkler Company, Inc. (hereinafter "Colquitt") to provide the materials and labor required to install a sprinkler system in the addition to the Howard University Hospital (A. 8, 36, 38).

Respondent, Road Sprinkler Fitters Local Union No. 669, U.S. (hereinafter "Local 669") is an unincorporated labor union representing sprinkler fitters employed by sprinkler contractors including Colquitt (A. 6, 45, 51).

Respondents, Trustees of the National Automatic Sprinkler Industry Pension Fund, the National Automatic Sprinkler Industry Welfare Fund and the National Automatic Sprinkler Local 669, U.S. Educational Fund (hereinafter "Trustees") are the trustees of the employee fringe benefit trust funds established by the Collective Bargaining Agreement (hereinafter "Agreement") between the National Automatic Sprinkler and Fire Control Association (hereinafter "Association") and Local 669 (A. 6, 10-15, 45).

Colquitt is a party to the Agreement. However, Colquitt is not a member of the Association, therefore, it was necessary for Colquitt to separately sign the Agreement in order to be bound by its provisions (A. 5-9).

This action involves claims against the Miller Act bond for unpaid fringe benefit contributions and monies withheld from the wages of the employees of Colquitt during the period May 1, 1973 through December 1, 1973, while said employees were engaged in the installation of a fire sprinkler system at the Howard University Hospital project.

2. *The Proceedings Below.* Respondents filed their complaint against petitioners in the United States District Court for the District of Columbia on May 9, 1974 (Civil Action No. 74-699) (A. 5-9). The basis for jurisdiction in the District Court action as set forth in the complaint was the Miller Act, 40 U.S.C. §§ 270a and 270b, as amended (A. 5-9). In response to the complaint, the petitioners filed on May 23, 1974, a motion to dismiss the complaint for failure to state a claim, or, in the alternative, on the ground that the court lacked jurisdiction over the subject matter of the complaint (A. 1, 19). In their motion, petitioners maintained that

respondents lacked standing to sue under the Miller Act, 40 U.S.C. § 270a, *et seq.*, because they had no contractual relationship with either the prime contractor or with a subcontractor as required by 40 U.S.C. § 270b (a). Respondents filed their response to the motion on June 13, 1974 (A. 1), and petitioners filed a reply to respondents' response on June 18, 1974 (A. 1). On July 3, 1974, the District Court entered an order denying the motion to dismiss (A. 1, 20). In denying petitioners' motion, the District Court interpreted this Court's opinion in *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974) to require a holding that Colquitt was a "subcontractor" within the meaning of the Miller Act notwithstanding the fact that Colquitt was a third-tier subcontractor (sub-subcontractor) having no contractual relationship, direct or implied, with the prime contractor (A. 20).

On July 15, 1974, petitioners filed a motion to reconsider the motion to dismiss, or, in the alternative to certify the decision for interlocutory appeal (A. 1, 21). Respondents filed their response to petitioners' motion on July 23, 1974 (A. 1) and on July 26, 1974, the District Court denied petitioners' motion (A. 1, 24). On August 5, 1974, petitioners filed an answer to the complaint (A. 1, 25). Six months of discovery efforts by both parties thereafter ensued.

On February 18, 1975, petitioners filed a motion for summary judgment, together with a supporting memorandum which set forth three separate grounds in support of the motion: (1) that respondents waived their right to file a claim on the Miller Act bond; (2) that respondents are estopped from filing a claim on the Miller Act bond; and (3) that respondents lack

standing to file a claim on the Miller Act bond because they had no direct contractual relationship with either the prime contractor or a subcontractor (A. 1, 35, 36-41). On March 24, 1975, respondents filed a cross-motion for summary judgment along with two affidavits and a memorandum in support thereof and in opposition to petitioners' motion for summary judgment (A. 2, 42, 43-56). Respondents requested the court to grant partial summary judgment with respect to petitioners' liability for the monies claimed. On April 7, 1975, petitioners filed a memorandum in opposition to respondents' cross-motion for summary judgment (A. 2), and on April 17, 1975, respondents filed a reply to petitioners' memorandum (A. 2). Thereafter, on June 6, 1975, the District Court entered an order denying petitioners' motion for summary judgment and granting respondents' cross-motion for summary judgment (A. 2, 57).

On July 1, 1975, petitioners entered their notice of appeal to the United States Court of Appeals for the District of Columbia Circuit from the District Court's order dated June 6, 1975 (A. 2, 58). On September 19, 1975, respondents filed in the Court of Appeals a motion to dismiss the appeal on the ground that the appeal was not within the jurisdiction of the court because the order from which the appeal was taken was neither a final judgment under 28 U.S.C. § 1291, nor an appealable interlocutory order under 28 U.S.C. § 1292, absent proper certification from the District Court (A. 2, 59). On October 24, 1975, the Court of Appeals entered an order dismissing the appeal (A. 2, 60). Thereafter, on motion, the District Court certified its order dated June 6, 1975, for interlocutory appeal by order dated October 29, 1975 (A. 2, 61, 62). On November 4, 1975, pe-

titioners entered their second notice of appeal (A. 2, 63) and on December 10, 1975, the appeal was docketed by the Court of Appeals (No. 75-2199) (A. 3).

After briefs were filed by the parties, the case came up for oral argument before the Court of Appeals on December 9, 1976 (A. 4). On January 28, 1977, the Court of Appeals entered its opinion and judgment affirming the decision of the District Court (A. 4, 64). Petitioners thereafter filed a timely petition for rehearing, or, in the alternative for a hearing *en banc,* which was denied on February 17, 1977 (A. 4, 66, 67).

On April 25, 1977, petitioners filed their petition for a writ of *certiorari* which was granted by this Court on June 27, 1977 (A. 68).

SUMMARY OF ARGUMENT

The Court of Appeals held that union trustees, seeking recovery of unpaid benefit funds and union dues, which were required to be withheld by a sub-subcontractor on a federal construction project from the wages of its employees under a collective bargaining agreement between the sub-subcontractor and the union, may sue to recover such monies under the Miller Act, 40 U.S.C. § 270a, *et seq.*, notwithstanding the fact that neither the union trustees nor the employees of the sub-subcontractor had any direct contractual relationship with either the prime contractor or a subcontractor. Petitioners challenge the holding of the Court of Appeals for the reasons set forth herein.

I

The Court of Appeals misinterpreted this Court's decisions in *Clifford F. MacEvoy Co.* v. *United States*

ex rel. Calvin Tompkins Co.,[1] and *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*[2] In both of these decisions this Court recognized that a Miller Act claimant must have a contractual agreement with the prime contractor or with a subcontractor. The decision of the Court of Appeals is in error because it eliminates this requirement.

II

The decision of the Court of Appeals for the District of Columbia Circuit is contrary to the holdings of the Courts of Appeals for the First, Fourth, Fifth and Ninth Circuits. Although these decisions pre-date this Court's decision in *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc., supra,* these decisions are consistent with this Court's decision in the *Rich* case and they are, in fact, correct interpretations of the law.

III

Congress clearly intended to limit the protection of a Miller Act bond to persons having a contractual relationship with either the prime contractor or a subcontractor. The Court of Appeals' holding that a sub-subcontractor was a "subcontractor" within the meaning of that term as used in the Miller Act, is contrary to the legislative intent.

---

[1] 322 U.S. 102 (1944)

[2] 417 U.S. 116 (1974)

ARGUMENT

1. The Court Of Appeals Misinterpreted The Decisions Of This Court

Prior to this Court's decision in *F. D. Rich Co., Inc.*, v. *United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974), the leading decision of this Court construing the Miller Act was *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tompkins Co.*, 322 U.S. 102 (1944).

The issue in *MacEvoy* was whether a person supplying materials to a materialman of a prime contractor can sue under the Miller Act. This Court held that he cannot. In fact, this Court said in *MacEvoy* that the right to sue on a Miller Act bond is limited to (1) those materialmen, laborers, and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give statutory notice of their claim to the prime contractor, 322 U.S. at 107-108. This Court said further that:

> "To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso [of 40 U.S.C. § 270b(a)] and to the expressed will of the framers of the Act. Moreover, it would lead to the absurd result of requiring notice from persons in direct contractual relationship with a subcontractor but not from more remote claimants." 322 U.S. at 108.

Although this Court in *MacEvoy* indicated that the Miller Act, like its predecessor, the Heard Act, Act of August 13, 1894, 50 U.S.C. § 270, as amended (1934 ed.), is highly remedial in nature and is entitled to a liberal construction and application in order to properly effectuate the Congressional intent to protect those furnishing labor or material on government projects, this Court said:

> "But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds." 322 U.S. at 107.

That the Miller Act provides a broad but not unlimited protection was also later recognized by this Court in *United States* v. *Carter*, 353 U.S. 210 (1957).[*]

The limitation recognized by this Court in *MacEvoy* was reaffirmed by this Court in *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*, *supra*, where this Court said:

> "The rights afforded by the act are limited, however, by the proviso of § 270(a). In [*MacEvoy*] this Court construed § 270b(a) to limit the protection of a Miller Act bond to those who had a contractual agreement with the prime contractor or with a 'subcontractor'. Those in more remote relationships, including persons supplying labor or material to a mere materialman, were found not to be protected." 417 U.S. at 122.

[*] Although the Court in *Carter* reaffirmed the limitations of the Act under its earlier decision in *MacEvoy*, it noted that the limitation of § 2(a), which is in issue in the instant case, was inapplicable under the facts of the *Carter* case because there the union trustees were claiming sums on behalf of workmen who supplied labor for the project directly to the prime contractor under an express contract with him. 353 U.S. at 217.

In *Rich*, the prime contractor, F. D. Rich Co., had a direct contractual relationship with Cerpac Co. who was to supply and install certain millwork and exterior plywood. Cerpac, in turn, ordered its requirements for exterior plywood from Industrial Lumber Co. The issue was whether Cerpac was a "subcontractor" for the purposes of the Miller Act or a mere materialman. This Court applied the "functional" definition of "subcontractor" previously adopted in *MacEvoy* and held that Cerpac was a "subcontractor" and, since Industrial, as a material supplier, had a direct contractual relationship with Cerpac, Industrial was protected under the Miller Act.

The "substantial relationship" test discussed in *Rich* as being the test of whether one is a subcontractor must be interpreted in the light of the facts of that case, which are far different from the facts of the present case. This Court in *Rich* had before it only the issue of whether Cerpac was a "subcontractor" or a materialman. Irrespective of whether Cerpac was a subcontractor or a mere materialman, there existed a contractual relationship between Cerpac and the prime contractor. No such contractual relationship existed between Colquitt and Bateson, the prime contractor, in the present case. We can find nothing in this Court's opinion in *Rich* indicating that this Court no longer considers it necessary for a "subcontractor" to have any contractual relationship with the prime contractor.[5] In *Rich* this Court merely said that the total

[5] In affirming the Court of Appeals' holding in *Rich* that Cerpac was a subcontractor for Miller Act purposes, this Court cited *Aetna Casualty & Surety Co.* v. *United States ex rel. Gibson Steel Company* 382 F. 2d 615 (5th Cir. 1967); *Basich Bros. Construction Co.* v. *United States ex rel. Turner*, 159 F. 2d 182 (9th Cir. 1946); *United States ex rel. Briant* v. *Lembke Construction Co.*, 370 F. 2d 293 (10th Cir. 1966); and *Travelers Indemnity Co.* v. *United States ex rel. Western Steel Co.*, 362 F. 2d 896 (9th Cir. 1966). It should be noted that in all of these cases the middle party, whose status as a subcontractor or materialman was in issue, had a direct contractual relationship with the prime contractor.

relationship between Cerpac and Rich must be looked at, "not just the contract" between those parties, to determine whether Cerpac was a subcontractor. 417 U.S. at 124. To say that the total relationship must be looked at is not tantamount to saying that no contractual relationship between the middle party and the prime contractor is necessary to make that party a subcontractor, for this would give the term "subcontractor" a new meaning far different from that established by usage in the building trades and recognized by this Court in *MacEvoy* and *Rich*.

In *MacEvoy* this Court defined a "subcontractor" as

> "* * * one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract * * *" 322 U.S. at 109.

The above definition was expressly reaffirmed by the Court in *Rich*. 417 U.S. at 123.

The fact that Colquitt performed a portion of the work called for under the prime contract is not sufficient to make Colquitt a "subcontractor" because Colquitt did not perform for and take such work from Bateson, the prime contractor but, on the contrary, Colquitt performed for and took such work from Bateson's subcontractor, Pierce, with whom Colquitt had a contract.[6]

[6] cf. *Continental Casualty Co.* v. *North American Cement Corp.*, 91 F. 2d 307, 308 (1937), where the Court of Appeals for the Dis-

Quite clearly, the Court of Appeals has misinterpreted the decisions of this Court in *MacEvoy* and *Rich*. The Court of Appeals recognized that Colquitt was "technically a sub-subcontractor".[7] Nevertheless, the Court of Appeals disregarded the definition of the term "subcontractor" set down by this Court and the commonly understood meaning of that term. The Court of Appeals has thus eliminated the limitation of the proviso of § 270b(a) from the Act. We submit that neither *MacEvoy* nor *Rich* permit such a result.

2. The Decision Of The Court Of Appeals For The District Of Columbia Circuit Is Contrary To The Holdings Of The Courts Of Appeals For The First, Fourth, Fifth And Ninth Circuits And Other District Courts Which Holdings Are Consistent With The Decisions Of This Court And Are Correct Interpretations Of the Miller Act.

The United States Courts of Appeals for the First, Fourth, Fifth and Ninth Circuits [8] have all held that a third tier subcontractor (the contractual tier of the respondents in this case) is too remote to be entitled to recover on a Miller Act bond.

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trict of Columbia Circuit expressed the opinion that the District of Columbia statute, which contained language identical to the Heard Act, *supra.*, should not be construed as giving protection to any person doing work or furnishing materials in carrying out the contract, however remote the relationship to the contractor.

[7] App. to petition for writ of certiorari p.4a, 551 F.2d at 1286.

[8] *United States ex rel. Powers Regulator Co.* v. *Hartford Accident & Indemnity Co.*, 376 F.2d 811 (1st Cir. 1967); *United States ex rel. W. J. Halloran Steel Erection Co.* v. *Frederick Raff Co.*, 271 F. 2d 415 (1st Cir. 1959); *United States ex rel. Dukane Corporation* v. *United States Fidelity & Guaranty Co.*, 422 F. 2d 597 (4th Cir. 1970); *Elmer* v. *United States Fidelity & Guaranty Co.*, 275 F. 2d 89 (5th Cir. 1960), *cert.* denied, 363 U.S. 843 (1960) *Fidelity & Deposit Co. of Maryland* v. *Harris*, 360 F. 2d 402 (9th Cir. 1966).

Except for the holding of one District Court,[9] which holding was expressly rejected by the First, Fifth, and Ninth Circuits,[10] and by other District Courts,[11] the decision of the Court of Appeals for the District of Columbia Circuit stands alone. Interestingly enough, the District of Columbia Circuit's definition of the term "subcontractor" is at variance with the definition of that term adopted under an earlier decision of that Court decided under the District of Columbia mechanics' lien law.[12]

The leading Court of Appeals decision on the subject is the 1960 decision of the Fifth Circuit in *Elmer* v. *United States Fidelity & Guaranty Co.*, 275 F. 2d 89 (5th Cir. 1960), *cert.* denied, 363 U.S. 843 (1960). In *Elmer*, the Tyler-Hyde Construction Company contracted with the United States for grading, asphalt paving and concrete paving at Key Field Airport, Meridian, Mississippi. United States Fidelity & Guaranty Company was surety on the Miller Act bond. Tyler-Hyde subcontracted the grading and asphalt paving to T. F. Scholes Company, which, in turn, sub-

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[9] *McGregor Architectural Iron Co.* v. *Merritt-Chapman & Scott Corp.*, 150 F. Supp. 323 (D. Pa. 1957).

[10] *United States ex rel. W. J. Halloran Steel Erection Co.* v. *Raff, supra; Elmer* v. *United States Fidelity & Guaranty Co., supra; Fidelity & Deposit Co. of Maryland* v. *Harris, supra.*

[11] *United States ex rel. Newport News Shipbuilding & Dry Dock Co.* v. *Blount Bro. Constr. Co.*, 168 F. Supp. 407, 411 (D. Md. 1958), *United States ex rel. Jonathan Handy Co., Inc.*, v. *Deschenes Constr. Co.*, 188 F. Supp. 270, 272 (D. Mass. 1960); *United States ex rel. Whitmore Oxygen Co.* v. *Idaho Crane & Rigging Co.* 193 F. Supp. 802, 803 (D. Idaho 1961).

[12] *Battista* v. *Horton*, 128 F. 2d 29, 31 (D.C. Cir. 1942).

subcontracted the asphalt paving to Acme Asphalt Company. The claimant, Elmer, was employed by Acme to perform inspection and testing services. Tyler-Hyde knew that Elmer was rendering services on the job.

Applying this Court's definition of the term "subcontractor" as set forth in *MacEvoy,* the Fifth Circuit found that Scholes was a sub-contractor of Tyler-Hyde and since Acme had a contractual relationship with the subcontractor Scholes, Acme would have been covered by the bond. But Acme was not a subcontractor since "it performed its work for Scholes rather than for the prime contractor, Tyler-Hyde." 275 F.2d at 90. Thus, Elmer was not covered by the bond because he had no contractual relationship with a subcontractor but only with the sub-subcontractor, Acme.

In United States ex rel. Powers Regulator Co. v. *Hartford Accident & Indemnity Co.,* 376 F. 2d 811 (1st Cir. 1967), the First Circuit, relying on *MacEvoy,* Elmer and the First Circuit's earlier decision in *United States ex rel. W. J. Halloran Steel Erection Co.* v. *Frederick Raff Co.,* 271 F. 2d 415 (1st Cir. 1959), held that a sub-sub-subcontractor (i.e., one having a contractual relationship with a sub-subcontractor) was too remote to be entitled to recover on a Miller Act bond.

The Fourth Circuit, in *United States ex rel. Dukane Corp.* v. *United States Fidelity & Guaranty Co.,* 422 F. 2d 597 (4th Cir. 1970), held that a material supplier of a sub-subcontractor "was too remote, too far down the line and had no protected status under the Act." 422 F. 2d at 600, citing *MacEvoy* and *Elmer.*

In *Fidelity & Deposit Co. of Maryland* v. *Harris,* 360 F. 2d 402 (9th Cir. 1966), the Ninth Circuit rejected

the argument, advanced by respondents in the present case, that any subcontractor, no matter how far down the line his contract was negotiated, who performs on the project an integral part of the work required by the prime contract, is entitled to Miller Act protection. 360 F.2d at 408. A renter of trucks to a sub-subcontractor was thus denied recovery.

Although the foregoing decisions pre-date this Court's decision in *Rich,* each of them merely applied this Court's definition of the term "subcontractor" as set forth in *MacEvoy,* namely, one who performs for and takes from the prime contractor a portion of the work called for under the prime contract. This definition was not changed by *Rich.* 417 U.S. at 123. The substantiality and importance of Cerpac's relationship with the prime contractor in *Rich* was looked at by the Court only to determine whether Cerpac was a "subcontractor" under the foregoing definition or a mere materialman. If there has been no contractual relationship between Cerpac and the prime contractor, it would not have been necessary for the Court to reach that issue.

We believe that the decisions of the Courts of Appeals for the First, Fourth, Fifth and Ninth Circuits are entirely consistent with the decisions of this Court and that they are correct interpretations of the Miller Act. The decision of the Court of Appeals for the District of Columbia Circuit, on the other hand, is an incorrect interpretation of the Act.

There are many subcontractors on large government contracts, and many sub-subcontractors, sub-sub-subcontractors and persons supplying them with labor and materials. The relationship between the employees of a

sub-subcontractor and that sub-subcontractor is one of the "more remote relationships" referred to by this Court in *MacEvoy* and *Rich* and in the legislative history of the Act.[13]

If the Court of Appeals' decision is affirmed, thus extending the coverage of the Miller Act bond to persons having no contractual relationship with either the prime contractor or subcontractor, but only with a sub-subcontractor, or with a sub-sub-subcontractor or perhaps a sub-sub-sub-subcontractor, it will be extremely difficult if not impossible, for a prime contractor to protect himself from claims under the bond. We believe that when this Court said in *MacEvoy,* that it was easy for the prime contractor to protect himself from "the relatively few subcontractors who perform part of the original contract" by requiring the subcontractors to give security by bond,[14] this Court had in mind those "subcontractors" with whom the prime contractor had subcontract agreements, not those in more remote relationships,[15] as in the case at bar.

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[13] cf. *United States ex rel. Newport News Shipbuilding & Dry Dock Co.* v. *Blount Bros. Const. Co.*, 168 F. Supp. 407 (D. Md. 1958).

[14] 322 U.S. at 110.

[15] Bateson did, in fact, require an indemnity agreement from its subcontractor, Pierce Associates. Pierce, believing that the protection of the Miller Act did not extend beyond Colquitt, required no indemnity agreement or bond from Colquitt. Under the Court of Appeals' decision, it will now be necessary for subcontractors to also require their sub-subcontractors to give surety by bond to protect themselves. However, in many cases, small sub-subcontractors will not be able to furnish such bonds and an indemnity agreement from an insolvent sub-subcontractor offers no protection. Additionally, the increased cost of the bond premiums will ultimately be passed on the government in the form of increased prime contract prices.

3. The Court Of Appeals' Interpretation Of The Miller Act Is Clearly Contrary To The Expressed Intent Of Congress.

The purpose of the Miller Act is to provide protection to those supplying labor or materials to a contractor on a federal construction project. Since a mechanic's lien cannot attach to government property, an alternative remedy is provided through the procedure of requiring that the prime contractor furnish a payment bond. The legislative history of the Miller Act makes it clear that the Congress intended to extend the protection of a Miller Act bond only to third tier contractors:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond." H.Rep.No. 1203 (74th Cong., 1st Sess.), p.3.

The use of the term "sub-subcontractor" in the Committee Report quoted above negates any contention that Congress intended to extend the protection of the Miller Act bond to the employees of a "sub-subcontractor" or beyond.

The limitation of Section 2(a) of the Miller Act, 40 U.S.C. § 270b(a), recognized by this Court in *MacEvoy* and *Rich,* is precisely the limitation referred to in the legislative history of the Act, namely, persons furnishing labor or material to a "subcontractor", i.e., one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract. A sub-subcontractor is within this protected category as well as a materialman of a sub-

contractor. But the employees of a sub-subcontractor are one step removed from the protection of the Act.

CONCLUSION

For the reasons set forth herein, it is submitted that the Court of Appeals for the District of Columbia Circuit has misinterpreted the decisions of this Court and the applicable provisions of the Miller Act. On the contrary, the decisions of the Courts of Appeals for the First, Fourth, Fifth, and Ninth Circuits are correct interpretations of the Act. The decision of the court below should therefore be reversed.

JACK REPHAN
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorney for Petitioners

Of Counsel:

DANZANSKY, DICKEY, TYDINGS,
QUINT & GORDON
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1476

J. W. BATESON COMPANY, INC., *et al.*,
Petitioners

v.

UNITED STATES OF AMERICA for and on behalf of the Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS

DONALD J. CAPUANO
PATRICK C. O'DONOGHUE
ROBERT MATISOFF
O'DONOGHUE & O'DONOGHUE
1912 Sunderland Place, N.W.
Washington, D.C. 20036
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

We accept the Petitioners' statement of the case. However, we emphasize the following findings upon which the Court of Appeals relied in reaching its decision:

> Colquitt was installing a sprinkler system in the addition to the hospital. The work was specifically required by Bateson's contract with the Government and was an integral and significant part of that con-

tract. The importance of this work is evidenced by the fact that Pierce itself hired Colquitt's employees to finish the job when Colquitt because of its financial difficulties could no longer perform.

The District Court found the relationship between Bateson and Colquitt "substantial and important". This is borne out by the nature of the work and the fact that it was performed over a substantial period of time. Moreover, it appears from the record that copies of Colquitt's payroll statement were submitted to Bateson. Since Colquitt's work was part of the main contract, was performed on the job site, and was of such obvious importance, Bateson was in a position to protect itself from Colquitt's default by obtaining security through bond or otherwise. (Pet. 4a-5a, footnote omitted.)[1]

Additionally, we point out that the fringe benefit contributions not made by Colquitt were required to fund retirement benefits and medical insurance for Colquitt's employees.

SUMMARY OF ARGUMENT

The purpose underlying the adoption of the Miller Act was to facilitate payment to those whose labor and materials contributed to the construction of public projects. The Act provides that an action on the payment bond furnished by a prime contractor pursuant to the Act may be brought by persons having a contractual relationship with either the prime contractor or a "subcontractor". The issue now before the Court is whether certain persons who labored over a substantial period of time on a public project, performing an integral and significant part of the project work, can claim on a Miller Act bond for

[1] The reference "Pet." is to the Petition for Writ of Certiorari filed in this case. The reference "Pet. Br." is to the Brief for Petitioners.

a portion of their earnings which was not paid by their employer. Urging an overly technical, mechanistic analysis, Petitioners contend that these employees cannot claim on the bond because their employer was only a "second-tier" subcontractor. According to Petitioners, only a "first-tier" subcontractor can be a "subcontractor" within the meaning of the Act. Rejecting Petitioners' technical approach to the statute and adopting, instead, a functional approach, the Court of Appeals found the employer involved to be a "subcontractor" within the meaning of the Act, thus allowing a claim on the bond on behalf of the employees. We show below that the functional approach of the Court of Appeals is in accord with both the remedial nature of the Act and the prior decisions of this Court and, thus, that the decision below should be affirmed.

I. In finding Colquitt to be a "subcontractor" under the Miller Act, the Court of Appeals, as did the District Court before it, merely applied the test that was developed by this Court in two prior decisions, *F. D. Rich* v. *United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974) and *Clifford F. MacEvoy* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102 (1944). That test holds that one is a subcontractor if he has a "substantial and important" relationship with the prime contractor. The relationship between Colquitt and Bateson was properly found to be "substantial and important", in view of the findings that Colquitt's work was an integral and significant part of Bateson's contract with the Government and was performed on the jobsite over a substantial period of time and that Bateson was in a position to protect itself from Colquitt's default by obtaining security through bond or otherwise.

II. However, even if this case were decided without the benefit of *Rich* and *MacEvoy*, the same result reached by the Court of Appeals would be warranted. The Miller Act

is entitled to a liberal construction in order to effectuate its purpose—the protection of those whose labor and materials go into public projects. Colquitt's employees, performing work on the job site which was a significant part of the work required by Bateson's contract with the Government, were persons within this class of the Act's intended beneficiaries. Adoption of the narrow construction of the Act proposed by Petitioners would frustrate the Act's purpose of protecting those who contribute to the construction of public projects. Moreover, it would lead to arbitrary and unreasonable distinctions in coverage under the Act: some employees laboring on public projects would be held to be protected by the Act, while others would not be, despite any difference between the two groups in the nature of the work performed or the importance of their contribution to the completion of the project. Further, adoption of Petitioners' narrow construction could tend to promote disruption and delay in the completion of Government construction projects, since employees will have no choice but to quit their employment when their wages or fringe benefit contributions are not paid.

Petitioners, the Associated General Contractors and two trade associations of sureties advance an array of policy arguments for denying protection to the employees of subcontractors below the first tier. These mutually inconsistent contentions suffer from the common infirmity that they fail to appreciate that the purpose of the Miller Act is to "protect those whose labor and materials go into public projects" (*Rich, supra*, 417 U.S. at 124, quoting *MacEvoy, supra*, 322 U.S. at 107).

ARGUMENT

I. THE COURT OF APPEALS PROPERLY APPLIED THE DECISIONS OF THIS COURT IN DETERMINING THAT COLQUITT WAS A SUBCONTRACTOR UNDER THE MILLER ACT

In *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974) (hereafter "*Rich*"), this Court unanimously declared that, in determining coverage under the Miller Act, the "test for whether one is a subcontractor [is] the substantiality and importance of his relationship with the prime contractor" (*id.* at 123). The decision below merely applied that standard to the particular facts of this case. The Court of Appeals determined that the District Court had correctly "found the relationship between Bateson and Colquitt to be 'substantial and important'" (Pet. 5a). Bateson's petition to the Court of Appeals for rehearing *en banc* was denied without dissent. As the decision below correctly applied the appropriate test fashioned by this Court itself, that decision should be affirmed.

Before proceeding with an examination of the precedents discussed below, a brief recital of the Miller Act's history is in order. The Miller Act[2] was designed to eliminate certain procedural deficiencies found to exist under the Heard Act.[3] The Heard Act required contractors entering into construction contracts with the Government to furnish a single bond designed to protect both the Government and those who supplied labor and materials to the prime contractor in the course of performance of the contract. The Government was given the first right to sue on the bond after completion of the

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[2] Act of August 24, 1935, c. 642, 49 Stat. 793, 40 U.S.C. § 270a *et seq.*

[3] Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by Act of February 24, 1905, v. 778, 33 Stat. 811; 40 U.S.C. § 270.

work and final settlement; only thereafter could other claimants sue, and all had to join in a single action on the bond. The result was serious inconvenience and delay in recovering on legitimate claims for labor or materials supplied, and this was the flaw which the Miller Act sought to correct. The major revision enacted by the Miller Act was its requirement that the prime contractor execute two separate bonds, the first a performance bond for the protection of the Government, and the second, a payment bond for the protection of persons supplying labor or materials in the performance of the work, which could be sued upon without regard to when the Government brought suit or when the project was completed.[4]

The intended beneficiaries of the single bond required by the Heard Act, other than the Government, were defined in the statute as "all persons supplying [the contractor] . . . with labor and materials in the prosecution of the work provided for in [his] . . . contract." This language in the Act was viewed as in no way limiting the right of recovery to those who contracted directly with the prime contractor. Indeed, "how" the labor or material was supplied—i.e., to whom it was directly supplied under contract—was deemed to be irrelevant. Anyone who contributed labor or materials to the prosecution of the work was held to be entitled to sue on the bond, without regard to his particular contractual engagement. *Hill* v. *American Surety Co.*, 200 U.S. 197, 204 (1906).[5]

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[4] *See* footnote 4 in *Clifford F. MacEvoy* v. *United States, ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 105-106 (1944).

[5] "There is no language in the . . . [Heard Act] nor in the bond which is therein authorized limiting the right of recovery to those who furnish material or labor directly to the contractor, but all persons supplying the contractor with labor or materials in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed. It is only required to be 'supplied' to the contractor in the prosecution of the work provided for. How supplied is not stated, and could only be known as the work advanced and the labor and material are furnished." *Hill* v. *American Surety Co.*, 200 U.S. at 204.

Some limitation on the class entitled to sue on the bond did, however, come into the law in the Miller Act. In *Clifford F. MacEvoy* v. *United States, ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 105-106 (1944) (hereinafter "*MacEvoy*"), this Court said: "There was no expressed purpose in the legislative history to restrict in any way the coverage of the Heard Act; the intent rather was to remove the procedural difficulties found to exist under the earlier measure and thereby make it easier for unpaid creditors to realize the benefits of the bond."[6] Nevertheless, the Court construed the Act as containing a limitation on coverage by an inference from a proviso to § 2(a) of the Act, which provides that an action on the separate payment bond furnished by the prime contractor could be brought not only by a party providing labor or materials directly to the prime, but by "any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond . . . ." The reason for this limitation is nowhere explained in the Act's legislative history. Our view is that it was deemed necessary in order to identify those persons actually "supplying labor and materials in the prosecution of the work", as opposed to those persons having more remote or ancillary connections with the project, so that the underlying purpose of

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[6] In explaining the purpose of the Miller Act, Rep. Miller stated in the House that the Act ". . . merely provides for two bonds, one for the protection of the Government's interests, and the other for the protection of the rights of labor, the subcontractors, and material furnishers." 79 Cong. Rec. 11702. Sen. Burke said in the Senate that "This bill would amend . . . [the Heard Act] by requiring an additional bond, a payment bond, for the protection of materialmen and laborers, subcontractors, and *all* who put forth their labor or furnish materials or incur expenditures in connection with the work." 79 Cong. Rec. 13382 (emphasis supplied). *See MacEvoy*, 322 at 109, n. 9.

the Act—and assured prompt payment to persons who supply labor or materials on public projects—could be more easily accomplished. Clearly, *some* means of defining the protected class entitled to sue on the payment bond had to be devised, or else every remote person whose labor or materials ultimately found its way into a public project could sue and deplete the bond to the detriment of those who made greater and more direct contributions to the completion of the project.

But while Section 2(a) of the Miller Act requires contractual privity with either the prime contractor or a "subcontractor" before a claimant may sue on the bond, Congress failed to define the term "subcontractor" anywhere in the Act. That was a task undertaken by this Court in two cases where the meaning of the Section 2(a) proviso and its requirement of privity with a "subcontractor" were directly at issue. The Court's decisions in both cases indicated that, in defining who is a "subcontractor" under the proviso and thereby determining standing under the Act, a "functional", rather than a technical, approach should be employed. Thus, although the Section 2(a) proviso requires that a claimant on the payment bond be in privity with a "subcontractor", privity is not controlling in determining whether or not the party with whom the claimant has the contractual relationship is a "subcontractor" under the Act.

The first of these cases was *MacEvoy*, *supra*. The claimant in *MacEvoy* was a supplier of certain building materials to a materialman of the prime contractor on a Government housing project. Neither the supplier nor the materialman were involved in the actual prosecution of work specified in the agreement between the prime contractor and the Government. When the materialman failed to pay the supplier, the latter sought to recover on the Miller Act bond furnished by the prime contractor, claiming that the materialman with whom he had a con-

tractual relationship was really a "subcontractor" within the meaning of the Section 2(a) proviso, thus enabling the supplier to sue on the bond. This Court disagreed. The Court defined a "subcontractor" as "one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract" (*MacEvoy*, 322 U.S. at 109), and excluded mere materialmen of the kind involved in *MacEvoy*, who "performed" no contract work, from the scope of this definition. The Court explained the exclusion by reference to practical considerations underlying the Miller Act:

> Congress cannot be presumed, in the absence of express statutory language, to have intended to impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself. The relatively few subcontractors who perform part of the original contract represent in a sense the prime contractor and are well known to him. It is easy for the prime contractor to secure himself against loss by requiring the subcontractors to give security bonds, or otherwise, for the payment of those who contract directly with the subcontractors . . . But this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman, who may be a manufacturer, a wholesaler or a retailer. *Id.* at 110.

The second case was *Rich*, *supra*, which, like *MacEvoy*, also involved a claim on a Miller Act payment bond by a supplier of materials to another party. The question was whether this latter party was a subcontractor or materialman. This time the Court held that the supplier was entitled to maintain his action on the bond: in addition to supplying materials to the prime contractor, the party in question in *Rich* actually performed part of the contract work, and, therefore, qualified as a subcontractor. The Court explained that the term "subcontractor" should

be defined in a "functional" rather than a "technical" manner. Endorsing the definition of "subcontractor" stated in its *MacEvoy* decision ("one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract"), the Court held that the test for determining whether one fell within that definition is "the substantiality and importance of his relationship with the prime contractor." *Rich*, 417 U.S. at 123. The Court explained the reasoning underlying its test in this way:

> It is the substantiality of the relationship which will usually determine whether the prime contractor can protect himself, since he can easily require bond security or other protection for those few "subcontractors" with whom he has a substantial relationship in the performance of the contract. *Rich*, 417, U.S. at 123-24.

Employing this functional approach developed in *MacEvoy* and *Rich*, the Court of Appeals correctly held below that Colquitt, although technically a "sub-subcontractor" of Bateson when the relationship between the two is viewed solely in terms of contractual privity, was a "subcontractor" within the meaning of the Section 2(a) proviso. To the Court of Appeals, the critical question, in view of the approach endorsed in *MacEvoy* and *Rich*, was not whether Colquitt itself had a direct contractual relationship with Bateson, but whether "Colquitt performed work provided for in the main contract and had such a relationship with prime contractor that the prime, Bateson, could have protected itself from Colquitt's default" (Pet. 5a). On the record before it, the Court of Appeals answered each part of this question affirmatively:

> Colquitt was installing a sprinkler system in the addition to the hospital. The work was specifically required by Bateson's contract with the Government and was an integral and significant part of that contract. The importance of this work is evidenced by the fact that Pierce itself hired Colquitt's employees to finish the job when Colquitt because of its financial difficulties could no longer perform.
>
> The District Court found the relationship between Bateson and Colquitt "substantial and important". This is borne out by the nature of the work and the fact that it was performed over a substantial period of time. Moreover, it appears from the record that copies of Colquitt's payroll statement were submitted to Bateson. Since Colquitt's work was part of the main contract, was performed on the job site, and was of such obvious importance, Bateson was in a position to protect itself from Colquitt's default by obtaining security through bond or otherwise. (Pet. 4a-5a, footnote omitted.)

Thus, the Respondents, who did have a contractual relationship with Colquitt, a "subcontractor" within the meaning of the Act, were held to be proper claimants on Bateson's payment bond.

Without addressing this well-reasoned analysis, the Petitioners continue to assert that Respondent's claim under the Miller Act is just too "remote", merely because Colquitt had no direct contract with Bateson. The chief flaw in the Petitioners' "remoteness" argument is that it is grounded in the kind of technical, formalistic analysis that was specifically eschewed by this Court in *Rich* and *MacEvoy*. The Court's decisions in both cases indicated that the purpose of the Miller Act's "remoteness" limitation is to protect prime contractors from claims against which they are unable to protect themselves. But when they *can* protect themselves, there is no interest which countervails "the Congressional intent to protect those whose labor and materials go into public projects." *Rich*, 417 U.S. at 124, quoting *MacEvoy*, 322 U.S. at 107. Thus, the inquiry into "remoteness" is not to be made by mechanically counting up contractual "tiers", as Petitioners

would have the Court do; rather, it is to be made by examining the relationship between the prime contractor and the person claimed to be a "subcontractor" to determine whether it is "substantial and important", such that the prime can reasonably be expected to take steps to protect himself against the other's default. *MacEvoy*, 322 U.S. at 110; *Rich*, 417 U.S. at 123-24.

In this regard, one of the factors relied upon below by both the District Court and the Court of Appeals becomes of critical importance. Colquitt was one of the "relatively few" (*MacEvoy*, 322 U.S. at 110) contractors performing contract work *on the job site* over a substantial period of time. Thus, Colquitt was "well known" to Bateson; and Bateson could readily "protect itself from Colquitt's default by obtaining security through bond or otherwise." Pet. at 5a.[7] However, it would not have been so easy for Bateson to protect himself against the default of, let us say, an ordinary materialman, whose only connection with the project may have been that he had shipped certain pipe or pipe fittings to Pierce. Our hypothetical materialman may well be located in another state; his only contact with any contractor engaged on the project may have been in limited correspondence or brief telephone conversations with Pierce in which the order for the materials was placed. Obviously, it would be unreasonable to expect Bateson to be responsible for claims made against the materialman, knowing nothing of his operation, and never having dealt with him; such claims *would* be too "remote". But such is not the case when, like Colquitt, the party against whom the claims are made is on the jobsite, performing contract work over

[7] Clearly, Bateson was well aware of Colquitt's contractual obligations for wages and fringe benefits to its employees, which gave rise to Respondents' claim herein, since copies of Colquitt's payroll records were submitted to Bateson during the course of the work (Pet. 5a).

a substantial period of time under the prime contractor's watchful eye.

The error of the mechanistic approach to the "remoteness" issue urged by Petitioners is further highlighted by comparison of the differing results reached by this Court in *MacEvoy* and *Rich*. For, the successful claimant in *Rich* was not more "remote" in terms of Petitioner's analysis than was the unsuccessful claimant in *MacEvoy;* both were at two removes, or two "tiers", from the prime contractor. Thus, inclusion or exclusion within the class of subcontractors under the Act depends not on proximity to the prime, but rather on the nature of the work performed. Comparison of the differing results reached in *MacEvoy* and *Rich* also demonstrates that the functional approach employed by the Court of Appeals is appropriate. As the Court observed:

> In *MacEvoy* a supplier contracting with a materialman of the prime contractor could not claim against the bond because he did not have a contract with a subcontractor or perform any work on the job. However, a similar claim was allowed in *Rich* because while the supplier technically contracted with only a materialman, functionally the materialman was a subcontractor, since he performed part of the original contract and the prime contractor was in a position to protect himself against any loss from the materialman's default. The functional approach emphasizes the view originally taken by the Court in *MacEvoy* when it highlighted the remedial nature of the Act. The Court said:
>
> > The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects. *MacEvoy Co.* v. *United States supra*, at 107. Pet. at 3a-4a.

Other arguments raised by the Petitioners in their attack on the decision below likewise lack merit.

First, the Petitioners argue that Colquitt cannot fall within the definition of the term "subcontractor" announced in *MacEvoy* (". . . one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract . . .") because Colquitt "performed for and took from" Pierce, not Bateson. This kind of reading of the *MacEvoy* definition obscures the realities of the situation. While, perhaps technically, Colquitt "took" its *contract* from Pierce and not Bateson, the fact of the matter is that its *work on the project* derived from Bateson's contract with the Government. As the Court of Appeals recognized:

> Colquitt was installing a sprinkler system in the addition to the hospital. The work was specifically required by Bateson's contract with the Government and was an integral and significant part of that contract. Pet. 4a.

Second, Petitioners' reliance on the one sentence of legislative history quoted at page 12 of the brief for Petitioners is unsound. A "sub-subcontractor" who, as was there explained, would be entitled to recover, is no less "remote" in terms of Petitioners' technical approach to the statute than the party who was found too remote in *MacEvoy*. Moreover, there is no indication anywhere in the legislative history that Congress intended to define the term "subcontractor" itself in terms of contractual "tiers". This Court itself has already indicated that the term is to be approached on a functional, and not a technical basis. *Rich*, 417 U.S. at 123.

Finally, Petitioners' reliance on those Circuit decisions cited at Pet. Br. 14-17 is misplaced. All of those cases cited antedate *Rich;* thus, all were decided without the benefit of the "substantial and important" test endorsed in that decision by this Court.

II. THE RESULT REACHED BY THE COURT OF APPEALS IS CORRECT EVEN AS A MATTER OF FIRST IMPRESSION

A. Petitioners argue that the Court of Appeals "misinterpreted" *Rich* and *MacEvoy*. According to them, the "substantial and important relationship" test developed in *Rich* for determining whether one is a subcontractor under the Miller Act should not have been applied by the Court of Appeals in the context of this case. Apparently, Petitioners would confine application of that test only to situations where at issue is whether one is a subcontractor or a materialman. (See Pet. Br. at 12). We doubt that *Rich* should be read as narrowly as Petitioners propose; but if so, then *MacEvoy*, too, must be confined to its facts, which, of course, involved a claim by a materialman of a materialman. For, while *Rich* and *MacEvoy* are mutually consistent if understood (as the Court of Appeals understood them) to declare a functional, rather than a technical test for coverage, it is the later case, *Rich*, which is the more authoritative precedent if there is any tension between them.

But let us assume *arguendo* that the Petitioners are correct on this score, and assume, further, that this Court were called upon to decide this case without the benefit of *Rich* and *MacEvoy* and as a case of first impression. Respondents submit that, were this the case, the same result reached below by the Court of Appeals would be required and the Respondents' right to claim on Bateson's payment bond would have to be upheld.

In *Fleisher E. & C. Co.* v. *United States*, 311 U.S. 15, 17 (1940) Mr. Chief Justice Hughes wrote for a unanimous Court:

> In construing the earlier Act, the Heard Act, for which the Miller Act is a substitute, we observed that it was intended to be highly remedial and should be construed liberally.

He explained further that under the Heard Act,

> a requirement which is clearly made a condition precedent to the right to sue must be given effect, but in determining whether a provision is of that character the statute must be liberally construed so as to accomplish its purpose. "Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute." Illinois Surety Co. v. John Davis Co., 244 U.S. 376. (*Id.* at 18.)

He added, "The same principle should govern the application of the Miller Act." *Id.*

Extending the protection of the Act to Colquitt's employees would be fully consistent with its object and appropriate under the liberal construction to which the Act is entitled. Colquitt was performing contract work on the job site; thus, his employees were persons actually "supplying labor . . . in the prosecution of the work" provided for in Bateson's contract—among the specific class of persons sought to be protected in Section 1(a)(2) of the Act and designated in Bateson's payment bond itself.[8] In view of the Act's intent, there is no reasonable basis for extending the protection of the Act to, let us say, Pierce's employees—and denying it to Colquitt's; both groups were contributing their labor on the jobsite to the completion of Bateson's contract work. The anomaly of Petitioners' construction of the Act is particularly striking, when it is remembered that after Colquitt defaulted, the same employees continued to perform the same work on the project as Pierce's employees (see Pet. 4a-5a); under Petitioners' construction, it was only then that the employees enjoyed protection of the Act.

As previously noted, the Heard Act, the Miller Act's predecessor, was construed to allow any person who contributed labor or materials to a public project to claim

[8] The bond itself adopted the language of the Act: ". . . all persons supplying labor and material in the prosecution of the work provided . . . for in said contract. . . ." (A. 17)

on the prime contractor's bond, without regard to whom his contract was with. *Hill* v. *American Surety Co.*, 200 U.S. 197 (1906). The Miller Act was enacted merely to remove the procedural obstacles to recovery found to exist under the earlier measure and thus make it easier for unpaid creditors to recover on the bond. *MacEvoy*, 322 U.S. at 105-06. In view of this specific purpose of providing greater protection to unpaid creditors than that afforded under the Heard Act, a construction of the Miller Act that would deprive a significant proportion of previously covered employees of the protection of a bond, would largely defeat the avowed intent of Congress. See the statements of the sponsors quoted at p. 7, n. 6 *supra*.

In terms of the language of the Act, the issue ultimately comes down to whether the term "subcontractor" in the proviso to § 2(a) was intended to mean "first-tier subcontractor" or was intended as a generic term including all those who take a part of the prime contract and perform it on behalf of the prime contractor. We submit that if the former meaning had been intended it would have been a simple matter for Congress to say so, for example, by using the adjective "first-tier" or by a limiting phrase such as "subcontractor who has contractual relationship with the prime contractor". On the other hand, for Congress to have articulated the proposition that subcontractors other than first-tier subcontractors are also eligible in any manner other than the use of "subcontractor" in its generic sense would have been exceedingly cumbersome. The phrase would have then had to read something like this: "Provided, however, That any person having direct contractual relationship with a subcontractor *or sub-subcontractor or sub-sub-subcontractor or sub-sub-sub-subcontractor*, etc. but no contractual relationship express or implied with the contractor * * *". Moreover, this awkward phraseology would have given the courts no authority to deny recovery to those lower-tier subcontractors whose contribution was unsubstantial or unimportant. It is also to be noted that the broader, generic

interpretation of "subcontractor" gives full effect to the notice requirement in the proviso, for such lower level subcontractors (and laborers and materialmen who made claims because of their default) would by the same token be required to provide notice to the prime contractor as a condition for suit or the bond. Respondents of course complied with that condition herein.

In construing the Miller Act to require the prime contractor, through the device of the payment bond, to be ultimately responsible to a second-tier subcontractor's employees, the Court would not be imposing any duties upon the prime remarkably different from others which the prime already owed to those employees. The courts have long recognized that a prime contractor does have certain duties toward *all* employees at work on the jobsite, without regard to which contractor, subcontractor, "sub-subcontractor" they are employed by. For example, Bateson, as a prime, owed Colquitt's employees a duty of reasonable care to prevent injury from hidden defects on the job site (*see, e.g., Meny* v. *Carlson*, 6 N.J. 82, 77 A.2d 245 (1950); *Smith* v. *Henger*, 148 Tex. 456, 226 S.W.2d 425 (1950); *Annot.*, 20 A.L.R.2d 870 (1950)). *See also Anning-Johnson Company* v. *United States Occupational Safety and Health Review Commission*, 516 F.2d 1081 (7th Cir. 1975), where, in holding that subcontractors could not be held liable for certain safety violations they did not create, the Court of Appeals recognized that it is the prime contractor on a construction suite who controls the work site, and who would be responsible. Thus, allowing Respondents to claim on Bateson's payment bond will hardly result in the kind of radical restructuring of traditional relationships between prime contractors and subcontractors that Petitioners have suggested would result. (Pet. 12.)

As the complexity of construction work has increased, so, too, has specialization among industry contractors.

The case at bar offers just one example: Bateson, charged with overall responsibility for construction of the Howard University Hospital addition, brought in Pierce to perform the "mechanical" work required under the contract. Pierce itself apparently was unwilling to perform installation of the sprinkler system required by the contract and, thus, brought in Colquitt, a contractor who specialized in that particular branch of the mechanical construction industry, although as events proved, Pierce was quite capable of performing the work itself. With specialization among construction industry contractors has come the opportunity for more "sub-subcontracts", "sub-sub-subcontracts", etc. (Of course, however, the total amount of the prime's contract work remains constant, no matter among how many lower tier contractors the work is divided.) If Petitioner's approach to the Miller Act prevails, the result will be a substantial shrinkage in the class of persons protected by the Act, as more employees engaged on public projects are found working for speciality "sub-subcontractors", "sub-sub-subcontractors", etc. Substantially shrinking the class of protected persons is wholly at odds with the declared Congressional intent "to protect those whose labor and materials go into public projects." *MacEvoy*, 322 U.S. at 107.

Petitioners argued below to the Court of Appeals and to the District Court that certain "self help" remedies were available to the Respondents which should have been pursued in lieu of claiming on the payment bond. One of these "self help" measures was the right of Respondent Local 669 under its collective bargaining agreement with Colquitt to call a strike if the pension and welfare fringe benefit contributions were not paid.[9] While Re-

[9] Article 25 of the agreement gives Local 669 the "right to remove employees from any job or jobs of the employer or to take other legal economic action against the employer if fringe contributions due and payable are not made". See Appendix 40, 47, 54.

spondent Local 669 could have exercised this right to call a strike when Colquitt did not make the required payments, it chose not to do so in this case. However, foreclosing employees such as Colquitt's from coverage under a payment bond will leave other employees on other Government projects under similar circumstances no choice but to quit their employment when their wages or fringe benefit contributions are not paid. *Cf. Anning-Johnson Company* v. *United States Occupational Safety and Health Review Commission, supra,* at 1090.

While we do not claim that the purpose of the Miller Act was to achieve industrial peace, it is highly incongruous to so construe the Act that employees are bereft of protection and are constrained to utilize self-help as the sole alternative to working for less than the agreed-upon wages and fringe benefits. The United States has two concerns: To achieve completion of the construction projects for which it has contracted without unnecessary delay and to protect those who make a substantial and important contribution to the project against loss due to the default of the party with which they deal. The construction advanced by petitioners and their allies subverts both of these interests. Instead, Petitioner Bateson advances the argument that under the Court of Appeals' construction, "the increased cost of the bond premiums will ultimately be passed on the government in the form of increased prime contract prices" (Pet. Br. 18, n. 15; see also Petition for Certiorari pp. 13-14). We submit that the very suggestion is "a tacit slander of the Nation's credit".[10] In any event, it reverses the actual Congressional order of priorities embodied in this legislation, without which there would be no bond requirement and no premium expense whatsoever.

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[10] The phrase is that of Jackson, J. dissenting in a tax case, *Lykes* v. *United States*, 343 U.S. 118, 129 (1952).

B. In an effort to lend plausibility to their restrictive interpretation of the Miller Act, Petitioners, and the *amici* on their side, advance a whole array of policy arguments. Not only are these arguments highly speculative in nature; they are also based upon fundamental misconceptions of the legislative intent underlying the Miller Act. Interestingly, the two *amici* propose differing versions of what the Miller Act is all about. Each believes it to be an Act for the relief of the class of enterprises which it represents. Both are wrong.

According to *amici* Surety Association of America and the American Insurance Association, the intent of the Miller Act was to protect those whose labor and materials contributed to public projections, while at the same time limiting the risk of exposure of the *surety companies* (Surety Assoc. Br. at 4).[11] As this Court said in *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947) "* * * the statutory provisions requiring a separate bond for payment of laborers and materialmen were enacted for their benefit, not to the detriment of the government. It is the surety who is required to take risk" (*id.* at 243-244).

Amicus Associated General Contractors of America, on the other hand, views the Miller Act as intended to benefit the *prime contractor* on Government projects. The reforms of the Heard Act made in the Miller Act, it is asserted, were intended to ". . . emphasiz[e] and facilitat[e] prompt payment to those within the purview of the Act, with, however, safeguarding limitation of the class to which the right of action was afforded, and no-

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[11] The reference to "Surety Assoc. Br." is to the Brief of the Surety Association of America and the American Insurance Association, as *Amici Curiae*. The reference to "Assoc. Gen. Contr. Br." is to the Brief of the Associated General Contractors of America as *Amicus Curiae*.

tice and limitation period for suit, all to enable the *contractor* safely to make payments promptly to its subcontractors without the hazard of later double payment" (Assoc. Gen. Contr. Br. at 3) (emphasis added). Again, there is nothing in the Act or its legislative history to indicate that the Act was intended to benefit anyone other than those persons who supplied labor and materials to a prime contractor in the construction of public projects.

It is argued, that, if allowed to stand, the lower court's decision will "materially expand the payment bond risk by imposing on the prime contractor and the surety *virtually unlimited* responsibility" for the payment of debts (Surety Assoc. Br. at 12) (emphasis added). (*See also* Assoc. Gen. Contr. Br. at 16.) The results of an increase in the risk factor, it is further argued, will be a decline in both the bonding capacity of contractors and the willingness of the sureties to underwrite bonds (Surety Assoc. Br. at 14-16). The assertions that the payment bond's risk factor will be "materially expanded" and that contractors and sureties will be open to "unlimited" liability ignore the particularistic, narrow findings on which the Court of Appeals based its decision: that the relationship between Colquitt and Bateson was "substantial and important", in that Colquitt performed work which was an integral and significant part of Bateson's contract work, in that Colquitt performed on the job site over a substantial period of time, and in that Bateson was in a position to protect itself by obtaining security against Colquitt's default (Pet. 4a-5a). When these findings are duly noted and the decision below thus correctly viewed, that decision can hardly be construed as exposing prime contractors or their sureties to "unlimited" risks. A "sub-subcontractor" not performing on the job site over a substantial period of time,

would not pass muster as a "lower tier subcontractor" under the Court of Appeals' holding. Certainly, a materialman of a materialman would not, for the court of course did not disturb the holding of *MacEvoy*. Since only the "relatively few" contractors who stand in a "substantial and important" relationship with the prime fall within the scope of the lower court's holding, any resulting increase in the payment bond risk factor should be slight.

It is further argued at Surety Assoc. Br. 12 that, in any event, the "substantial and important" test itself is uncertain and not well-suited to application because it is difficult to "draw the line" among those relationships which are and those which are not "substantial and important". Respondents perceive no difficulty at all in identifying those "relatively few" (*MacEvoy*, 322 U.S. at 110) contractors, performing contract work on the job site, with whom the prime has a "substantial and important" relationship. The law is replete with similar tests, functional in nature, which permit judges and juries to reach equitable results in different factual contexts.[12] As Mr. Justice Frankfurther wrote, "the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment." *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 198 (1941).[13] But if the "substantial and important" test

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[12] Consider for example, the "reasonable man" test so familiar in various branches of the law.

[13] *Phelps Dodge* is not alone in construing the National Labor Relations Act to require consideration of the "totality of circumstances" (see *NLRB* v. *Pipefitters*, 429 U.S. 507, 521, n. 8, 524 (1977)) and disapproving "mechanical answers" (*Labor Board* v. *Steelworkers*, 357 U.S. 367, 364 (1958)) where Congress has not, in terms, established such a test. See also, *e.g.*, *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 482, nn. 4 and 5 (1960); *Teamsters Union* v. *Labor Board*, 365 U.S. 667, 676 (1961); *Labor Board* v. *News Syndicate*, 365 U.S. 695, 699-700 (1961) (disapproving *per se* tests).

is uncertain, it would appear that this Court itself—which formularized the test in *Rich*—felt disposed to tolerate some uncertainty in the interest of construing the Miller Act in a manner consistent with its underlying intent.

A direct attack is made at Surety Assoc. Br. 16 on this Court's reasoning in *MacEvoy* and *Rich*, and adopted in the decision below, that a prime contractor can protect himself against claims on its payment bond by requiring "downstream" bonds [14] from other contractors on the job with whom the prime has a "substantial and important" relationship. The Association argues that it is impractical, given the number of parties on a construction project, to require the surety to warrant against default by all of them. However, this objection is exaggerated for two reasons: First, the Court of Appeals' test construes the coverage requirement as applicable only to those downstream contractors who take a "substantial and important" part of the original contract; their number, as distinguished from that of all subcontractors and materialmen who may have some part in the project, is readily manageable. Second, the Association's impracticality argument founders on the record of this case, for Bateson did, in fact, insist upon bonds from the subcontractors with whom it dealt directly; Pierce, the plumbing subcontractor, could have imposed a similar requirement on Colquitt had it chosen to do so. And the Associated General Contractors argue that "many small business contractors" have difficulty in obtaining bonding and therefore will find themselves unable to participate under federal contracts. (Assoc. Gen. Cont. Br. 15-16.) We think it fair to say that very few general contractors or others engage in transactions with other parties whose financial responsibility is in doubt without safeguarding

[14] The term is that of one brief *amici*, and is not to be found in the statute or this Court's decisions.

themselves from the attendant risks; it comes with somewhat poor grace for their trade association to contend that employees should be required to assume the risk of nonpayment of wages and other benefits. In any event, the Miller Act is not an Act for the relief of small businesses or financially weak enterprises, and the effort to attribute that intention to Congress is no more plausible than the contentions that it is for the benefit of prime contractors or their sureties. It is a paradoxical suggestion that the protections of the Miller Act should be denied to those employees who need them the most, because the contractor's financial standing is so questionable that no surety will provide a bond.

The argument is made at Surety Assoc. Br. 8 that, since Bateson didn't select Colquitt to perform on the job, neither Bateson nor its surety should be expected to guarantee Colquitt's obligations to its employees. But it is the prime contractor who determines whether to perform a particular part of the work itself, or to subcontract it directly, or to permit subdelegation by the subcontractor with whom it has direct dealings. For example, Bateson could have chosen to install the sprinkler fittings with employees it hired, or to contract directly with Colquitt or some other sprinkler fitter contractor. The choice between these alternatives is made by the prime contractor for business reasons which are good and sufficient to it, including its own capabilities, and, in the final analysis, the method which is likely to be the most profitable given the capital that the prime contractor wishes to invest in the project. We do not for a moment question the right of prime contractors to make such choices. But we do seriously challenge the proposition that it is desirable public policy to shift the risk of default by a subcontractor to that subcontractor's employees because the prime contractor has subcontracted an "integral and significant" (Pet. 4a) portion of the contract and has opted to allow further subdelegation. Our understanding of the free en-

terprise system is that entrepreneurs are entitled to seek profit, but it is they who assume the financial risks, not their workers. And we are confident that Congress so understood it when it adopted the Miller Act to cure the procedural infirmities of the Heard Act.

CONCLUSION

The decision of the Court of Appeals properly applied the decisions of this Court and construed the Miller Act in a manner consistent with its underlying intent. The Petitioners urge a mechanistic approach to the Miller Act which would frustrate that intent and would lead to arbitrary, unreasonable distinctions in extending the protection of the Act to persons whose labor and materials contribute to the construction of public projects. The Petitioners' approach should be rejected, and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

DONALD J. CAPUANO
PATRICK C. O'DONOGHUE
ROBERT MATISOFF

O'DONOGHUE & O'DONOGHUE
1912 Sunderland Place, N.W.
Washington, D.C. 20036

Attorneys for Respondents

FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1476

J. W. BATESON COMPANY, INC., et al., *Petitioners*

v.

UNITED STATES OF AMERICA for and on behalf of the Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONERS' REPLY BRIEF

JACK REPHAN
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorney for Petitioners

Of Counsel:

BRAUDE, MARGULIES, SACKS &
REPHAN, Chartered
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

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PETITIONERS' REPLY BRIEF

COUNTERSTATEMENT OF THE CASE

Respondents have accepted Petitioners' statement of the case. However, since respondents seek to place undue emphasis on what they characterize as "findings" of the Court of Appeals, petitioners believe it necessary to point out to the Court that the so-called "finding" of the District Court that the relationship between Bateson and Colquitt was "substantial and

important" was only an unsupported conclusion of the District Court contained in the order dated July 3, 1974, denying petitioners' motion to dismiss (App. 20). Other than the complaint, petitioners' motion to dismiss with accompanying points and authorities in support thereof, respondent's memorandum in response to the motion to dismiss, and argument of counsel for the parties, there was no basis upon which the District Court could make any factual findings. There was no trial or hearing and no evidence before the District Court upon which to base any finding with regard to the relationship between Bateson and Colquitt and even assuming that the allegations of the complaint were deemed to be admitted for the purpose of petitioners' motion to dismiss, there are no facts pleaded in the complaint which would support a finding that the relationship between Bateson and Colquitt was "substantial and important."[1]

The mere fact that Colquitt was installing a sprinkler system in the addition to the hospital does not of itself form a basis for any conclusion that Colquitt's relationship to Bateson was "substantial and important." Nor does the mere fact that the sprinkler work was specifically required by the prime contract support such a finding for every item of material and every hour of labor required to complete the project was, in a sense, required by Bateson's prime contract.

Petitioners would also like to point out to the Court that no significance should be placed on the fact that

[1] The work to be performed by Colquitt under its sub-subcontract with Pierce was, in fact, only a very minor item of work in consideration of the fact that Bateson's prime contract was for $39,015,272.20.

Pierce hired Colquitt's employees to finish the job when Colquitt, because of its financial difficulties, could no longer perform. Pierce was simply doing what it was required to do to insure that its subcontract with Bateson was fully performed. Whether the sprinkler work was a significant or insignificant part of its subcontract was unimportant because Pierce was contractually bound to complete this work regardless of whether it was a minor or a major portion of Pierce's subcontract with Bateson.

With respect to the fact that copies of Colquitt's payrolls were submitted to Bateson, petitioners wish to point out that such records in no way reflected the fact that the fringe benefit contributions were not being paid by Colquitt to respondents.

ARGUMENT

I. Respondent Misconstrues the Decisions of This Court

Respondents seek to polarize the positions of the parties by characterizing petitioners position as an "overly technical, mechanistic analysis" while urging the Court to adopt a functional approach to find that Colquitt was a "subcontractor". Petitioners' position is not, however, that a technical, mechanistic approach should be adopted, but simply that a correct application of the functional approach adopted by this Court in *F. D. Rich Co., Inc.* v. *United States ex. rel. Industrial Lumber Co.*, 417 U.S. 116 (1974) and *Clifford F. MacEvoy* v. *United States ex rel. Calvin Tompkins Co.*, 322 U.S. 102 (1944) would deny to Colquitt the status of a subcontractor. Respondents would have this Court ignore the factual basis upon which the Court applied the "substantial relationship" test in *Rich* to find that

Cerpac was a "subcontractor." In determining that Cerpac had a substantial and important relationship with Rich, the prime contractor, the Court found that not only did Cerpac have a contract with Rich to supply exterior plywood, but it also had a separate contract with Rich to select, modify, detail, and install all custom millwork. Not only did the Court find that Cerpac, in effect, had taken over a substantial part of the prime contract, but the management and financial structures of Cerpac and Rich were closely interrelated and their relationship on the project in issue was the same as on many other similar Government projects during the same period. The Court further commented that the Court of Appeals had observed, that Cerpac was "in a special, integral, almost symbiotic relationship [with] Rich." 47 U.S. at 124.

The relationship of Colquitt to Bateson, on the other hand, was in no way the type of relationship found to be "substantial and important" in *Rich*.

Respondents would have this Court summarily disregard all of the Circuit Court decisions cited in petitioners' brief pages 14-17 on the basis that they antedate *Rich*. However, this Court's opinion in *Rich* makes it abundantly clear that a functional test was adopted in *MacEvoy*. *Rich* did not establish a new test, but the Court merely applied the functional definition previously adopted in MacEvoy, to the facts in *Rich* to find that Cerpac was a "subcontractor". Likewise, the decisions of the various Circuit Courts relied upon also applied the definition of "subcontractor" set forth in *MacEvoy*. Those decisions cannot simply be brushed aside as no longer representing the law on the subject.

II. The Result Reached by the Court of Appeals Is Incorrect Even as a Matter of First Impression

Respondents argue that the adoption of the position urged by petitioners would lead to arbitrary and unreasonable distinctions in coverage under the Act because some employees laboring on public projects would be held to be protected by the Act while others would not be. Upon close analysis it is in respondents' position, not petitioners', which would result in unreasonable distinction in coverage for only employees of "subcontractors" whose work is substantial and important would be covered. What Respondents actually wish this Court to hold is that all laborers working on Government construction projects are protected under the Act. Yet respondents would apparently treat materialmen in a different vein. The proviso of 40 U.S.C. § 270b(a) makes no distinction between those supplying labor and those furnishing material to a "subcontractor". Thus, respondents' suggestion that Colquitt's employees are entitled to a special status because they were performing work on the job site is not well taken.

Respondent's argument that the adoption of petitioners' position would promote disruption and delay in the completion of Government construction contracts since employees would have no choice but to quit their employment when their wages or fringe benefits are not paid only serves to demonstrate respondents' misconception of the practical applications of the Miller Act. If employees are not paid their wages when due, they will quit their employment regardless of the fact that they might have a right to make claim on the Miller Act bond. As far as the non-payment of fringe benefits is concerned, it is unlikely that the employees would even be aware of the fact that such contributions

had not been paid until after their work had been completed.

While respondents recognize that the coverage of the Miller Act is limited by the proviso of § 2(a) of the Act, they interpret the limitations to apply to those persons having a more remote or ancillary connection to the project than those persons actually "supplying labor and materials in the prosecution of the work." Respondents' interpretation is directly contrary to the holding of this Court in *MacEvoy* where a mere supplier of materials to a materialman was held to be too remote and the holding of this Court in *Rich* that a supplier of materials to a subcontractor was covered by the Miller Act bond. A protected person under respondents' theory would be required to actually supply both labor and materials in the prosecution of the work. This approach would exclude a mere materialman altogether which is obviously not the intent of the Act.

Respondent's attempt to confer a special status upon Colquitt's employees simply because they performed labor over a period of time on the project and because a portion of their earnings in the form of fringe benefit contributions was not paid. Obviously, respondents have taken this approach in order to create the false impression that petitioners are attempting to deny recovery to the employers solely on a technicality. This clearly is not the case. Petitioners say simply that Colquitt cannot qualify as a "subcontractor" under the definition of that term set forth in *Rich* because to be a "subcontractor" something more must exist in the relationship between the prime and the "subcontractor" than was the case here, where no contractual relationship whatsoever existed between Colquitt and Bateson.

Furthermore, Colquitt's employees are not the claimants in this case, but the claimants are Union Trustees who not only allowed the contributions in issue to go unpaid for a lengthy period of time after they became due and were not paid, but who also waived the requirement under the collective bargaining agreement between the Union and Colquitt that Colquitt furnish a bond to secure payment of the contributions in issue (App. 13, 25, 49). Furthermore, although respondents technically complied with the notice requirement of the Miller Act, it cannot be said that the Union Trustees did all they should have done to see that Colquitt's obligations were paid. Although not required by the Miller Act, if notice had been given to Pierce that Colquitt was not meeting its obligations under the collective bargaining agreement, Pierce would have been in a position to take steps to insure that the contributions were paid from funds being paid by Pierce to Colquitt (App. 37). If recovery of the contributions in issue is to be denied, it is apparent that some, if not all, of the blame may be placed on respondents. Respondents suggest that the only action which would have been available if the pension and welfare contributions were not paid would have been a strike called at the request of Local 609 if relief was not available under the Miller Act. This clearly is not so. If respondents had not waived the bond requirement and had they acted promptly when Colquitt ceased making the contributions, this action would never have occurred because the contributions required of Colquitt would have long since been paid out of monies becoming due from Pierce to Colquitt.

CONCLUSION

Respondents' arguments go far beyond the confines of the Miller Act. To extend coverage to respondents would eliminate the limitations of coverage under the Act which were previously recognized by this Court in *MacEvoy* and *Rich*. If coverage is to be extended to cover persons such as respondents in this case, this is a matter for the Congress, not for the judiciary, for Congress plainly limited coverage under the Act to those persons furnishing labor or materials to the prime contractor or to a subcontractor of the prime contractor—"A sub-subcontractor may avail himself of the protection of the bond," however, those in "more remote relationships" are not within the purview of the bond (H. Rep. No. 1203, 74th Cong., 1st Sess. p. 3). Respondents arguments should be rejected and the decision of the Court of Appeals reversed.

Respectfully submitted,

JACK REPHAN
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorney for Petitioners

Of Counsel:

BRAUDE, MARGULIES, SACKS &
REPHAN, Chartered
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1476

J. W. BATESON COMPANY, INC., et al., *Petitioners*

v.

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE SURETY ASSOCIATION OF AMERICA AND THE AMERICAN INSURANCE ASSOCIATION AS AMICI CURIAE

STANLEY C. MORRIS, JR.
JAMES V. DOLAN
ALLAN GATES
STEPTOE & JOHNSON
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Counsel for Surety Association of America and American Insurance Association

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BRIEF OF THE SURETY ASSOCIATION OF AMERICA AND THE AMERICAN INSURANCE ASSOCIATION AS AMICI CURIAE

INTEREST OF AMICI CURIAE [1]

The Surety Association of America (SAA) is a non-profit unincorporated trade association organized in 1908. It has 431 member companies, most of which are engaged in the business of suretyship. Among its activities, SAA makes filings with regulatory authorities, secures statistical data, prepares forms of coverage for use by its members, and on appropriate occasions represents its members' interest in suretyship issues of national concern.

The American Insurance Association (AIA) is a non-profit unincorporated trade association organized in 1965. It is the successor through merger of the National Board of Fire Underwriters (established in 1866) and the Association of Casualty and Surety Companies (established in 1927). It has 147 member companies, most of which are engaged in the suretyship business. Among its activities, AIA digests all statutes and cases affecting suretyship and appears before legislative bodies and administrative agencies on behalf of its members.

The members of the SAA and AIA constitute a majority of the surety companies in the United States. As sureties, they underwrite the great majority of payment bonds issued under the Miller Act [2] for prime contractors on construction projects of the Govern-

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[1] This brief is filed pursuant to Supreme Court Rule 42(2) with the consent of all parties. Letters of consent from the parties have been filed with the Clerk of the Court simultaneously with this brief.

[2] 40 U.S.C. § 270a *et seq.*

ment. The scope of the coverage provided by those bonds, and thus the scope of the companies' liability exposure thereunder, is defined by the Act and the courts' interpretation thereof. Accordingly, the member companies of SAA and AIA will be directly affected by the Court's decision in this case.

SUMMARY OF ARGUMENT

The Miller Act was intended to balance the needs of laborers and materialmen for financial protection against the sureties' need to reasonably measure the risks they would be asked to assume. This balance was achieved by requiring prime contractors to obtain payment surety bonds but limiting the coverage of those bonds to parties in privity of contract with either the prime contractor or its direct subcontractors. The opinion of the lower court in this case disrupts this essential balance by extending Miller Act payment bond coverage to claimants far removed from the contractual relations of the prime contractor and its subcontractors. In doing so, the lower court disregarded the language of the Miller Act and its legislative history, and it contravened this Court's prior holdings in *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974) and *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102 (1944).

The decision of the lower court, if allowed to stand, will expose prime contractors and their sureties on projects already underway to vastly increased risks that were never anticipated at the time the contracts were undertaken. The amount of risk which a surety can reasonably assume is a function of the contractor's

financial strength. The ultimate consequence of the expansion of risk resulting from the lower court decision will be that fewer contractors will have the requisite financial strength to qualify for bonds in the future and the amount of the bonds for which they can qualify will be smaller. This will restrict future Government projects to the larger and better financed contractors who are able to demonstrate their ability to indemnify sureties against the greatly increased risk of exposure to downstream claims.

ARGUMENT

I. The Decision of the Court Below Is Contrary to the Language of the Miller Act, Its Legislative History, and the Prior Decisions of This Court.

The decision of the lower court in this case is contrary to both the prior decisions of this Court and the plain language of the Miller Act. To understand the error of the lower court's decision and the significant impact it will have upon the surety industry and Government construction, one must appreciate what Congress was attempting to do when it enacted the Miller Act.

With passage of the Miller Act, Congress was attempting to strike a balance. Congress wished to provide a private surety guarantee of payment to those persons supplying labor and materials on federal construction projects in order to compensate for the lack of mechanic lien rights against the Government. At the same time, Congress recognized that such guarantees would be feasible only if the private sureties could reasonably measure the risk they would be asked to assume.

The difficulty of risk measurement lay in the fact that on large construction projects involving many different trades and materials, significant parts of the work could be delegated down through many levels of subcontractors, sub-subcontractors, material suppliers to sub-subcontractors, etc. For example, in the case of a contract to construct an army base consisting of several buildings and connecting roads, the prime contractor, being principally a building contractor, might subcontract out all road work to a road contractor, who might, in turn, subcontract the asphalt paving portion of the road work (as opposed to the grading and sub base portions) to a paving contractor. The paving contractor might, in turn, relet half of its work to a smaller firm. Half of the paving would thus be done by employees of a firm several tiers removed from the prime contractor. In such a case, a guarantee of payment to the employees who actually performed the sub-sub-subcontracted paving work would require a guarantee that (1) the prime will pay the road contractor, (2) the road contractor will pay the paver, (3) the paver will pay the smaller firm, and (4) the smaller firm will pay its employees.

Congress, in passing the Miller Act, recognized that no surety could reasonably be expected to measure, and thus undertake, a risk which was so extended and so dependent upon the financial soundness and integrity of companies, e.g., the sub-sub-subcontractor, whose identity normally is not even known when the bond is issued. Congress, therefore, recognized that the reach of the payment bond had to be limited. It did this by including in the Miller Act the proviso in § 270b(a). This proviso was totally ignored by the lower court in this case.

The proviso in § 270b(a) defines the limits of the surety's payment guarantees (or, conversely, the rights of claimants) in terms of privity of contract. To recover on a Miller Act payment bond, the claimant must have had a contractual relationship with either the prime contractor or one of the prime's direct subcontractors. As this Court stated in *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944):

> The proviso of [§ 270b(a)] . . . makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor . . . .

This limitation goes to the very heart of the suretyship undertaking. Suretyship is not insurance. It is a guarantee of the principal's financial ability, integrity, and commitment to live up to its contract obligations, akin to a guarantee of a bank loan. The surety's issuance of a bond is based upon its investigation and evaluation, much like a bank credit evaluation, of the principal's financial strength and record of performance. Under the Miller Act, the surety's payment bond, on its face, goes, with one minor exception, only to the prime contractor's obligations to pay those with whom it has directly subcontracted or directly purchased materials. The only exception is that the bond also guarantees payment of a claimant who has a "direct contractual relationship with a subcontractor" and has satisfied certain notice requirements.

This statutory limitation of bond coverage is neither arbitrary nor hypertechnical. It is a common-sense policy based upon the nature of the suretyship relation (a guarantee that the principal will fulfill its contract obligations) and the practical reality that most Government construction contracts involve performance of work at multiple tiers (e.g., prime contractor, subcontractor, sub-subcontractor, etc.). The rationale underpinning the statutory limitation is particularly well illustrated by the instant case. In this case, the surety was properly expected to guarantee payment at the first tier, i.e., that the prime contractor, for whom the bond was issued on the strength of its financial and past performance record, would pay its direct subcontractors and direct material suppliers. The prime contractor in this case, J. W. Bateson Co., fulfilled that payment obligation. Congress also determined that it was reasonable for the surety to guarantee that the prime's direct subcontractors would pay those with whom they had a direct contract relationship, i.e., that payment would be made at the second tier. This is a reasonable burden because the prime contractor selects its direct subcontractors and can avoid doing business with a subcontractor that is weak financially or has a poor reputation for paying its debts. The prime contractor can also include in its subcontract such terms as are needed to minimize or protect against any failure of its subcontractors to pay those from whom they obtain labor or materials. In this case, that was no problem since Bateson's direct subcontractor, Pierce Associates, did, in fact, pay all of its contract obligations.

The only non-payment in this case occurred at a lower level when Colquitt, a sub-subcontractor that

had no contract with Bateson, failed to pay its employees' union welfare benefits. J. W. Bateson Co.'s surety in this case cannot reasonably be expected to guarantee that a company, such as Colquitt, which Bateson did not select and as to whom Bateson had no contract rights, would pay its contract obligations. Before issuing the bond, a surety can satisfy itself within reasonable limits that the prime contractor for whom the bond is issued can and will pay its debts and that it will choose only direct subcontractors who will do the same. However, the surety cannot be expected to go further and guarantee the financial ability and integrity of remote sub-subcontractors about whom it knew nothing when it issued the bond and over whom the prime had no power of selection or control.

The necessity of the statutory limitation is confirmed by the legislative history of the Miller Act, as well as this Court's decisions in *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974), and *MacEvoy Co., supra.* In explaining why the right to sue on a Miller Act bond was being limited to those with a direct contract relationship with either the prime contractor or one of its direct subcontractors, the House Report on the Miller Act stated, "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond." H.R.Rep. No. 1263, 74th Cong., 1st Sess. at 3. To extend the Act's coverage to employees of a sub-subcontractor or, as here, to a union welfare fund making a claim against a sub-subcontractor goes that extra step which Congress clearly chose not to take.

In *MacEvoy*, this Court explicitly recognized that Congressional intent when it quoted the foregoing statement from the House Report and then added: "To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers of the Act." 322 U.S. at 108. The Court went on in *MacEvoy* to explain why the bond's protection stops with those who have a direct contract relationship with a direct subcontractor of the prime contractor:

> Practical considerations underlying the Act likewise support this conclusion. Congress cannot be presumed, in the absence of express statutory language, to have intended to impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself. The relatively few subcontractors who perform part of the original contract represent in a sense the prime contractor and are well known to him. It is easy for the prime contractor to secure himself against loss by requiring the subcontractors to give security by bond, or otherwise, for the payment of those who contract directly with the subcontractors. *United States* v. *American Surety Co., supra,* 204; *Mankin* v. *United States, supra,* 540. But this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman, who may be a manufacturer, a wholesaler or a retailer. 322 U.S. at 110.

In *MacEvoy*, the Court was dealing with claimants who supplied materials to a materialman. However, the Court's holding as to the Act's application and its rationale as to remoteness apply equally, if not more

so, to the instant claim of a union welfare fund representing employees of a third tier sub-subcontractor.

This Court's decision in *F.D. Rich Co.* is not to the contrary. The lower court's decision in this case misapplied *Rich* by taking this Court's comments completely out of context. In *Rich,* the claimant had supplied materials to Cerpac, a subsidiary of the prime contractor. Cerpac had two separate contracts with the prime—one a direct subcontract to install millwork and the second a materials contract to supply the lumber. The issue in *Rich* was whether the claimant was a supplier of a materialman (under Cerpac's material contract), not covered by the Act, or a supplier of a subcontractor (under Cerpac's installation subcontract), covered by the Act. This Court held that under those facts substance prevailed over form and Cerpac's two contracts (one for labor, the second for materials) would be considered as one, making it a subcontractor. There was no question in *Rich* that Cerpac had a direct contract relationship with the prime contractor and, indeed, was an *alter ego* of the prime in the true sense. That is not the situation here.

The "substantial relationship" test was used in *Rich* only to determine whether a subsidiary, which had a direct contract with the prime, was a first-tier subcontractor or a first-tier materialman. It was not used by this Court, as it now is being used by the lower court, to "jump a tier" and transform a sub-subcontractor, with no contract relationship at all with the prime, into a direct subcontractor with such a relationship. Indeed, in *Rich* the Court indicated that this tier distinction between a direct subcontractor and a sub-subcontractor could not be so blithely erased

when it referred with apparent approval to its earlier definition, in *MacEvoy,* of a subcontractor as "one who performs for and *takes from the prime contractor* a specific part of the labor or material requirements of the original contract." 417 U.S. at 123 (Emphasis added). The sub-subcontractor, Colquitt, did not take any work from the prime contractor in this case. The prime contractor subcontracted that work to Pierce. Colquitt took its work from and was performing for Pierce, the subcontractor, not Bateson, the prime contractor. Under the *MacEvoy-Rich* definition, therefore, Colquitt is not a subcontractor and the lower court's decision to that effect is in error.

The lower court in this case did not merely misapply a test previously adopted by this Court for determining the Miller Act's coverage; it went much further and totally discarded the "contractual relationship" test of the statute and substituted in its stead a new test whereby a sub-subcontractor becomes a direct subcontractor whenever its services are "substantial and important." The extent of this disregard for the language of the statute and the prior decisions of this Court is illustrated in the lower court's concurring opinion, which states:

> Whether the labor and materials are furnished directly to the prime contractor or through a subcontractor or a sub-subcontractor is irrelevant as far as the protection provided by the Act is concerned.[1]

This statement that a contractual relationship with the prime contractor or a subcontractor is "irrelevant" under the Miller Act flies in the face of both the statu-

[1] 551 F.2d 1287.

tory language and this Court's holding in *F. D. Rich, Inc.* that:

> The rights afforded by the Act are limited, however, by the proviso of § 270b(a). In *MacEvoy Co.* v. *United States ex rel. Tomkins Co., supra,* this Court construed § 270b(a) to limit the protection of a Miller Act bond to those who had *a contractual agreement* with the prime contractor or with a "subcontractor." 417 U.S. at 122 (emphasis added).

There is no basis in fact or law for conferring subcontractor status on the sub-subcontractor in the present case, since there was no privity of contract with the prime contractor.

II. The Decision of the Court Below Will Disrupt the Surety Bond Marketplace and Impair the Capacity of Contractors to Undertake Government Contracts.

The lower court's error in this case is not an academic one. There are billions of dollars in Government contracts in progress that will be affected by the present case. If allowed to stand, the lower court's decision will have a substantial impact on every Government construction project, both present and prospective, since it materially expands the payment bond risk by imposing on the prime contractor and the surety virtually unlimited responsibility for the payment of debts by others with whom they have no contract relationship and over whom they have no meaningful control. The man who digs the coal to make the steel is just as "substantial and important" to the prosecution of the work as the man who installs the product in the project. Yet the prime construction contractor and its surety cannot reasonably be expected to guarantee that this miner will be paid by the mine owner. Where do

you draw the line? Virtually every act of providing service or materials is "substantial and important" if acceptance of the contract work cannot be had without it.

Economic realities are such that this risk exposure cannot be ignored by a surety. To compensate for the substantially greater exposure, sureties necessarily will have to become more selective in the issuance of bonds. The greater the exposure is, the greater the prime contractor's financial strength must be before a bond can be issued consistently with sound underwriting practices. The present decision, therefore, unless corrected, will ultimately cause a substantial dislocation in the market place by restricting the number of contractors that can qualify for bonds and by restricting the amount of the bonds for which even the successful contractors may qualify.

That such will be the ultimate practical consequence of the present decision follows from the special nature of the suretyship relation. As indicated above, suretyship is a specialized transaction which is underwritten only upon the credit worthiness, performance record, and financial strength of the principal and its promise to indemnify and hold the surety harmless from all loss, costs, and expenses of whatever kind and however arising under the bond. The fee the surety receives, which is paid only once, is small, starting at 1% of the contract amount for contracts up to $1,000,000 and declining to about ½% for contracts over $2,500,000. The fee is not an actuarial computation of the risk. It is a charge to cover management's expense of prequalifying the contractor[*] and to provide a profit, if

[*] *I.e.*, determining the contractor's capacity to perform the work and pay accounts for labor and materials.

there is no loss. Unlike in the insurance industry, the surety's real protection against bond losses lies not in the bond fee but in the principal's promise to hold the surety harmless from any loss and in the principal's financial ability to keep that promise. The principal's indemnity, coupled with the personal indemnity of the owners of the business, which is also usually required as a condition to underwriting the bonds, is the heart of the principal-surety relationship. The ultimate protection of the surety is, therefore, the financial capacity of its principal and indemnitors to pay claims that arise under the bonds.

Prior to the present decision, sureties would normally issue a Miller Act bond in an amount up to 10 times "net quick" assets[5] (or higher) of those principals having a good record on contracts of a similar nature. Thus, a well regarded contractor with a net quick of $1,000,000 could certainly obtain bonds up to $10,000,000. Contractors with a less favorable experience or higher risk exposure would be written, if at all, at much lower multiples, such as 5 times net quick. The greater the risk involved, the lower the multiple becomes, and the amount of bond coverage a particular contractor can obtain is reduced accordingly.

Under the lower court's decision, the risk under a Miller Act payment bond would become considerably greater than it was under prior decisions since there then would be a new bond liability for a sub-subcontractor's failure to pay its employees for certain work even though the prime has paid its subcontractor for the work and that subcontractor has paid the sub-subcontractor. In the event of such a payment default by the

[5] *I.e.*, net current assets.

sub-subcontractor, the prime contractor would be forced to pay twice for the same work, or if it is financially unable to do so, the surety would be compelled to pay a third-tier claim that, until now, was not considered covered by the bond. Thus, an entirely new level of risk would be added to Miller Act payment bonds.

Sureties will be unable to underwrite this expanded risk except at considerably lower multiples of net quick than before. Since most contractors will be unable to materially increase their net quick, this will restrict substantially the contractor's bonding capacity. The reduction in bonding capacity will (i) limit the contractor's ability to take on new work for the Government and (ii) confine it to smaller contracts than previously.

These are the consequences of an increased risk, since suretyship is grounded on principles of indemnity and the fee charged for acting as surety is not an actuarial computation of the risk. Indeed, suretyship defies actuarial rating in the insurance sense, since every construction project differs.

A San Francisco Bay bridge, a Hoover dam, a new addition to the Library of Congress all pose different risks. If a dozen San Francisco Bay bridges were to be built, for example, on the identical site at about the same time by different contractors, credible statistics would emerge which could be used to establish a realistic single premium rate for the risk of building more San Francisco Bay bridges at that site without the need for indemnity. This, then, would be insurance. Since it is impossible to obtain credible loss experience through repetitive construction of each project, suretyship underwriting is premised on the indemnity re-

sources of the contractor and its indemnitors. To do otherwise would require guessing at a single premium rate for each construction project and, out of caution, that rate would probably be excessively high—so much so as to add very materially to the cost of the work.

To the extent that increased losses resulting from the present case are not recovered from indemnitors, they must be paid by the surety from its own capital resources. This will affect sureties in their willingness to underwrite Federal Government construction contracts.

The Court of Appeals opinion suggests that a contractor can protect itself by requiring downstream bonds. However, that solution is neither practical nor necessarily in the public interest. Given the time constraints within which the work must be performed and the size of the projects, an array of parties become involved, with hundreds and even thousands of purchase orders, subcontracts, sub-subcontracts, etc., on down the line. Most, if not all, of these parties are "substantial and important" in the context of providing labor or materials essential to aceptance of the work.

Setting aside questions of the impracticality of full "downstream" bonding and public policy considerations over restrictive provisions that would have to be incorporated in every contract to accomplish the desired downstream protection, other concerns emerge. It is to be anticipated that complete subcontractor downstream bonding will necessarily restrict the market to the larger subcontractors that can get bonding. As a consequence, entry into the market by smaller subcontractors will be discouraged, competition will be narrowed, and this suggests that contract prices for work will rise.

Also, unless the present case is reversed, the courts will doubtlessly be confronted with the argument that, notwithstanding this Court's holding in *MacEvoy*, pure material suppliers are also subcontractors because they are "substantial and important" to the work. If that should emerge as a legal reality, then the restrictiveness of a requirement for full downstream bonding to protect the prime contractor will reshape the material supply business in the United States. The exposure from downstream claims will be of such magnitude that the bonding capacity (net quick) of the material suppliers will be a prime consideration in making purchases, with price and availability of materials a lesser consideration. Eventually, only the giants in the materials industry will have the capacity to furnish bonds to prime contractors for the billions of dollars of material purchased annually to perform Government construction contracts.

It is well understood that liberal construction is to be given to the Miller Act. But liberality of construction is not meant to go so far as to extend the scope of the Act. As this Court stated in *MacEvoy:*

> The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects. *Fleisher Engineering Co.* v. *United States,* 311 U.S. 15, 17, 18; cf. *United States* v. *Irwin,* 316 U.S. 23, 29, 30. But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds. . . . [W]e cannot disregard the limitations on liability which Congress intended to impose and did impose in the proviso of [§ 270b(a)]. 322 U.S. at 107.

The Court in that case went on to conclude with an observation that is equally applicable to the present case:

> To impose unlimited liability under the payment bond to those sub-materialmen and laborers is to create a precarious and perilous risk on the prime contractor and his surety. To sanction such a risk requires clear language in the statute and in the bond so as to leave no alternative. Here the proviso of [§ 270b(a)] of the Act forbids the imposition of such a risk . . . . 322 U.S. at 111.

CONCLUSION

We shall not recite the long line of authority in contradiction of the present case. They appear in other briefs. The policy of Congress to restrict the scope of the Act to those in privity of contract with the prime contractor and its subcontractors is evident and clear from the statute itself. Therefore, the Court is urged to reverse the lower court's decision in the present case.

Respectfully submitted,

STANLEY C. MORRIS, JR.
JAMES V. DOLAN
ALLAN GATES
STEPTOE & JOHNSON
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Counsel for Surety Association of America and American Insurance Association

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1476

J. W. BATESON COMPANY, INC., *et al.*, *Petitioners*

v.

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, *et al.*, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA AS AMICUS CURIAE

KAHL K. SPRIGGS
1000 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorney for Amicus Curiae The Associated General Contractors of America

Of Counsel:

SPRIGGS, NICHOLSON & MYERS
1000 Sixteenth Street, N.W.
Washington, D.C. 20036

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IN THE

Supreme Court of the United States

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No. 76-1476

J. W. BATESON COMPANY, INC., *et al.*, *Petitioners*

v.

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, *et al.*, *Respondents*

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BRIEF OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA AS AMICUS CURIAE

STATEMENT OF INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is filed on behalf of The Associated General Contractors of America (AGC) with the written consent of all parties in this case.

The AGC is a voluntary trade association, in existence for more than sixty years, with approximately 8500 members, the overwhelming majority being small business contractors. Its membership is composed of general contractors dedicated to the purpose of im-

proving the professional standards of the construction industry and the skill, integrity and responsibility of its member firms, which are engaged throughout the United States in all phases of construction work on federal, state and private projects.

The AGC is interested in all federal statutes relating to construction, remodeling or repair of public buildings or public works of the United States, and particularly the interpretation and application thereof by the courts affecting the obligations and responsibilities of the members as prime contractors, as principals on performance and payment bonds executed by them, and as indemnitors of their sureties on those bonds. Thus, AGC is vitally interested in any extension of vicarious liability or responsibility on construction projects, statutory or decisional, which may have the effect of overburdening its members.

THE FACTS

The facts sufficiently appear in the record, and need not be repeated. Suffice it here to recount that J. W. Bateson Company, Inc., was the prime contractor with the United States for the construction work; Pierce Associates, Inc., was a subcontractor of Bateson; Colquitt Sprinkler Company, Inc., was a subcontractor of Pierce—a sub-subcontractor as to Bateson; respondent Road Sprinkler Fitters Local Union No. 669, UA, had a contract with Colquitt, and respondent trustees are the trustees of the Employee Fringe Benefit Trust Funds established by the Collective Bargaining Agreement to which Colquitt was a party. The recovery sought and allowed respondents was for fringe benefit funds and union dues withheld by Colquitt.

ARGUMENT

The Court of Appeals Failed to Recognize That the Reforms of the Miller Act, Which Superseded the Heard Act, Were Expressly Designed to Facilitate Prompt Payment by Providing a Limitation Upon the Class Entitled to Sue on the Bond, with Safeguards Against the Risk of Double Payment.

The decision and judgment of the Court of Appeals used the earlier and different Heard Act standards as to the entitlement to recovery without seeming to recognize its deficiencies and the dissatisfactions respecting it which inhibited prompt payment, although safeguarding against double payment. In doing so, the Court of Appeals did not take into account the reforms of the Heard Act made in the Miller Act, emphasizing and facilitating prompt payment to those within the purview of the Act, with, however, safeguarding limitation of the class to which the right of action was afforded, and notice and limitation period for suit, all to enable the contractor safely to make payment promptly to its subcontractors without the hazard of later double payment. (Decision reported in 551 F.2d 1284.)

The Heard Act (1905)—Its Deficiencies

It seems desirable to treat the Heard Act[1] briefly, in order to give the setting for the Miller Act and to delineate the policy considerations and the reasons for its enactment with the provisos contained in Section 2a (40 USC 270b). Although the Heard Act required a bond containing an obligation that the contractor should promptly make payments to all persons supply-

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[1] Set forth in footnote 1 in *U.S. ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U.S. 157, 160 (1914).

ing him with labor and materials in the prosecution of the work provided for in the prime contract, nevertheless in practice no such prompt payment could be made and far too frequently was not made. The bond required by the statute was a combined performance and payment bond, with the right in the United States as the obligee, first to satisfy its demands should the contractor default both in performance of the contract and in the payment of labor and material claims.

Moreover, six months had to elapse after "final settlement" occurred between the contractor and the United States to allow time for the United States to bring suit if it had a claim on the bond. The determination of "final settlement" was itself productive of much litigation and delay. *Illinois Surety Co.* v. *U.S.*, 240 U.S. 214 (1916); *Globe Indemnity Co.* v. *U.S.*, 291 U.S. 476 (1934); *United States Casualty Co.* v. *District of Columbia*, 71 App. D.C. 92, 107 F. 2d 652 (1939), under the District of Columbia counterpart of the Heard Act (decision per Rutledge, Associate Justice).

If no suit was brought by the United States on the bond, then, after six months from the date of final settlement, an action might be brought by a claimant, the initial suit being called the instituting creditor's suit, and all others were required to intervene so that the action was to be prosecuted as a single action and all obtained an enforcible judgment at one time. *Miller* v. *American Bonding Co.*, 257 U.S. 304 (1921); *Arnold* v. *U.S.*, 263 U.S. 427 (1923). Thus, the unpaid excavating subcontractor could not get paid any sooner than the unpaid roofer.

The Heard Act was held not to be limited in allowing recovery down the vertical line from the subcontractor

so that a sub-subcontractor, sub-sub-subcontractor, etc., could recover on the bond. *Hill* v. *American Surety Co.*, 200 U.S. 197 (1906); *MacEvoy* v. *U.S.*, 322 U.S. 102, 104-106, and footnotes 2, 3 and 4 (1944).

Nevertheless, even the Heard Act had its limitations on the right of recovery, e.g., *Hardaway* v. *National Surety Co.*, 211 U.S. 552 (1909), financing the contractor; *U.S.* v. *Standard Surety & Casualty Co.*, 32 F. Supp. 836 (1940), denying recovery for insurance premiums on workmen's compensation and employer's liability policies.

Moreover, in *U.S. ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U.S. 157, 162 (1914), this Court, after remarking that the right of action on the bond was created in favor of certain creditors of the contract; that the cause of action did not exist before and was the creature of the statute, said:

> "The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself."

Payment in full by a contractor to his subcontractor was not a defense under the Heard Act. *Mankin* v. *U.S.*, 215 U.S. 533 (1910). Nevertheless, the hazard of double payment was avoided in the Heard Act by the necessity of prosecuting all claims in one action in

one court so that adjustments could be made at the various levels.[2]

Thus, the Heard Act's liberal allowance of recovery as above outlined suffered from the serious defect of not only militating against prompt payment, but also of undue delay in payment with expensive litigation often resulting. *MacEvoy* v. *U.S., supra,* footnote 4.

The Miller Act

In order to remove the abuses which the Heard Act generated and permitted, the Miller Act was enacted in 1935, the pertinent part of which is as follows (40 USC 270b):

"§ 270b. Same; rights of persons furnishing labor or material

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefore before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

"Aug. 24, 1935, c. 642, § 2, 49 Stat. 794; Aug. 4, 1959, Pub. L. 86-135, § 1, 73 Stat. 279."

Aside from the provisions in the Miller Act for separate performance and payment bonds, eliminating the conflict between the United States and the creditors in cases of default in performance as well as in payment of the contractor's obligations under the bond,

[2] If the contractor owed a subcontractor $200,000 and the latter owed his subcontractor $100,000 and the last in turn owed his subcontractor $50,000, the adjustments would be made accordingly, so no duplication of payments would result to the contractor.

the essential reforms made by the Miller Act are contained in the provisos to which the Court of Appeals has not really given effect,[3] and in subsection (b) of Section 2a.

Furtherance of prompt payment was the dominant Congressional policy, which, however, in the light of the realities of the commercial world, to be achieved needed both as a spur and as careful, specific safeguards against the hazards thereof, the elements in the provisos and in the last paragraph of the Act, all which are conditions of the right to sue and built-in to the remedy:

1. The 90 days' notice to the prime contractor by those who had contracts with a subcontractor.

2. Cut-off at the designated levels or limitation of right to sue to subcontractors and to those having express or implied contracts with subcontractors.

3. Cut-off of the right to sue by requiring that such action be brought within one year after performing of the last of the work or furnishing the last of the material for which the claim was being made.

4. Confining all actions on the particular bond to the court having jurisdiction over the place where the prime contract was to be performed, thus further facilitating consolidations of cases and adjustments.

[3] The House Report, No. 1263, 74th Cong., 1st Sess., is printed in the Exhibit to this brief. The Senate Report, No. 1238, simply submitted as its report the House report.

The Notice Provision of the Act

The provision requiring a sub-subcontractor or a supplier to a subcontractor to give notice[4] of his claim to the contractor is obviously necessary both to encourage prompt payment and to make it possible safely to pay or to deduct appropriately from the subcontractor's payment. The notice is for the benefit of the prime contractor and is a condition of liability. *U.S.* v. *Kelley*, 327 F. 2d 590 (CA9, 1964); *U.S.* v. *H. I. Lewis Const. Co.*, 375 F. 2d 194 (CA2, 1967); *U.S.* v. *Freethy*, 469 F. 2d 1348 (CA9, 1972); House Report, *supra*.

The Class Entitled to Sue and to Recover

The Congressional policy, by the express terms of the Miller Act and by the clear intention of Congress expressed in the House and Senate Reports, confines the right of action to a subcontractor and to those having contracts, express or implied, with a subcontractor. It would be absurd to require the notice only by those who had contracts with a subcontractor, i.e., a subcontractor or a supplier of materials to a subcontractor, if more remote persons could sue and recover, without such notice. The House Report, *supra*, stated:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond."

The Courts of Appeals and the District Courts have given effect to the limitation of the class to which the right of action was created and confined by the Miller

[4] Not necessarily by registered mail. See *Fleisher Eng. & Const. Co.* v. *U.S.*, 311 U.S. 15, 17-18 (1940).

Act and to the intention of Congress in that regard. *U.S.* v. *Hartford Accident and Indemnity Co.*, 376 F. 2d 811 (CA1, 1967); *U.S.* v. *Frederick Raff Co.*, 271 F. 2d 415 (CA1, 1959); *U.S.* v. *United States Fidelity & Guaranty Co.*, 422 F. 2d 597 (CA4, 1970) *Elmer* v. *United States Fidelity & Guaranty Co.*, 275 F. 2d 89 (CA5, 1960), *cert. den.*, 363 U.S. 843 (1960); *Fidelity and Deposit Co. of Maryland* v. *Harris*, 360 F. 2d 402 (CA9, 1966); *U.S.* v. *Blount Bro. Constr. Co.*, 168 F. Supp. 407, 411 (D. Md. 1958); *U.S.* v. *Deschenes Constr. Co.*, 188 F. Supp. 270, 272 (D. Mass. 1960); *Whitmore Oxygen Co.* v. *Idaho Crane & Rigging Co.*, 193 F. Supp. 802, 803 (D. Idaho 1961). The one exception, other than the court below in the instant case, seems to be *McGregor Architectural Iron Co.* v. *Merritt-Chapman & Scott Corp.*, 150 F. Supp. 323 (D. Pa. 1957).

MacEvoy, supra, was a rejection of an urged extension of the Act and of Congressional policy, wherein a claim of a person supplying materials to a materialman of a contractor with the United States was denied, the Court deciding that a materialman was not a subcontractor. The Court said (322 U.S., at 107) that it could not "disregard the limitations on liability which Congress intended to impose and did impose in the provisos of Sec. 2(a) [of the Miller Act, 40 USC 270b]." The Court reiterated that principle in *U.S.* v. *Carter*, 353 U.S. 210, 216, allowing recovery, however, because the contract of the Union was directly with the contractor, Carter. See also, *Aetna Cas. & Sur. Co.* v. *U.S.*, 382 F. 2d 615 (CA5, 1967), and *U.S.* v. *Wright Contracting Co.*, 194 F. Supp. 444, 448 (Chesnut, J., D. Md. 1961, commenting on the necessity of a complete reading of *MacEvoy*).

The One-Year Provision of Section 2(b) of the Miller Act (40 USC 270(b)) is Itself Also a Limitation Upon Liability.

The rule or principle established by this Court in *U.S.* v. *McCord, supra,* that the one-year period was a limitation of liability and a condition of the right to sue by private claimants under the Heard Act, was carried over into the Miller Act Section 2(b) comparable provision. *Fleisher Eng. & Contr. Co.* v. *U.S.*, 311 U.S. 15 (1940); *U.S.* v. *Montgomery*, 253 F. 2d 509 (CA3, 1958); *U.S.* v. *Western Casualty & Surety Co.*, 359 F. 2d 521 (CA5, 1966); *U.S.* v. *Home Indemnity Co.*, 489 F. 2d 1004 (CA7, 1973); *U.S.* v. *Edward R. Marden Corp.*, 289 F. Supp. 141 (D. Mass., 1968).

From the foregoing, it may be seen that the notice, limitation of class of persons afforded a right of action on the payment bond, and the one-year provision, all have been authoritatively held to be conditions of liability and of the right to maintain a suit on the Miller Act bond.

The Court of Appeals, in Misconceiving *MacEvoy* and *F. D. Rich*, Contravened in Its Opinions and Judgment the Remoteness Proviso of Section 2(a) of the Act.

MacEvoy, the prime contractor, bought building materials from Miller, who in turn purchased them from Tompkins. While MacEvoy had paid Miller in full, the latter's payment to Tompkins left an unpaid balance. The issue was whether Tompkins, who had supplied materials to a materialman on a Government contract, could recover under the Miller Act.

After remarking that the Act should be liberally construed and applied properly to effectuate the intent

of Congress, the Court specifically cautioned (322 U.S. 108-110):

> "But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds. Ostensibly the payment bond is for the protection of 'all persons supplying labor and material in the prosecution of the work' and 'every person who has furnished labor or material in the prosecution of the work' is given the right to sue on such payment bond. Whether this statutory language is broad enough to include persons supplying material to materialmen as well as those in more remote relationships we need not decide. Even if it did include such persons we cannot disregard the limitations on liability which Congress intended to impose and did impose in the proviso of § 2(a). However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' D. Ginsburg & Sons v. Popkins, 285 US 204, 208, 76 L ed 704, 708, 52 S Ct 322, 19 Am Bankr Rep(NS) 589.
>
> "The proviso of Section 2(a), which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-contractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give 'the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers

> of the Act.' Moreover, it would lead to the absurd result of requiring notice from persons in direct contractual relationship with a subcontractor but not from more remote claimants." (Footnote omitted.)

The Court, after observing that in a broad, generic sense, a subcontractor includes anyone who has a contract to furnish labor or material to the prime contractor but under the more technical meaning as established by usage in the building trades, a subcontractor "is one who performs for and takes from the prime contractor, a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen," held that "the word, 'subcontractor' was used in its technical sense so as to exclude laborers and materialmen" (322 U.S. at 109, 110).

By virtue of the proviso of Section 2(a) of the Act, Tompkins was denied the right to sue on the bond.

In *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116 (1974), the question was whether Cerpac Company, which had two contracts directly with Rich, the prime contractor, was a subcontractor as to the exterior standard plywood contract.[4] Cerpac bought the plywood from Industrial Lumber Co., which was the use-plaintiff. However, Cerpac "was closely intertwined with Rich. The principals of Rich held a substantial voting interest in Cerpac's stock, supplied a major share of its working capital and were thoroughly familiar with its operations and financial condition." Some invoices from Industrial for the plywood went

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[4] Cerpac was a subcontractor for the furnishing and installing of the custom millwork.

directly to Rich.' The Court looked at the total relationship between Cerpac and Rich, including the close interrelationship between the management and financial structures of the two companies, and said:

> "Cerpac was, as the Court of Appeals observed, 'in a special, integral, almost symbiotic relationship [with] Rich.' 473 F2d, at 724. It would have been easy for Rich to secure itself from loss as a result of a default by Cerpac."

In effect, the corporate veil was pierced, and Cerpac was considered to be the *alter ego* of Rich. The Court again stated that the rights created by the Miller Act were limited by the proviso of Section 2(a).

The facts in *MacEvoy* and *Rich* are far different from those in the instant case, and the holdings of this Court in those cases are no support for the judgment below.

The remarks in the decision of the Court below in the "Opinion for the Court" (551 F. 2d, at 1285):

> "Like the Heard Act which it replaced, the Miller Act carried forward settled congressional policy to ensure that those who aided in the completion of Government projects would not be financially injured by the default of a contractor who happened to be low bidder for a contract."

and the statement in the concurring opinion (551 F. 2d, at 1287):

> "Thus the congressional intent is 'to protect those whose labor and materials go into public projects' because such costs are not recoverable against the United States."

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[1] Similar to *Continental Casualty Co.* v. *North American Cement Corp.*, 67 App. D.C. 234, 91 F. 2d 307 (1937), cited in fn. 3 in *MacEvoy*.

seem to disregard not only the proviso of Section 2(a) of the Miller Act limiting the right of action on the bond to a specific class of persons, but also the decisions of this Court and those of other federal courts, *supra*.

The payment bond does not "ensure" payment of accounts receivable of any and all, no matter how far removed downward from the contractor or outward to remote persons—financiers, remote material or equipment suppliers, and so on. The outer limits of vicarious liability on the payment bond under the approach of the Court of Appeals are undefined and would be difficult even to envisage.

The Prime Contractor, as a Principal on the Payment Bond, Suffers the Loss from the Results of Extensions of Vicarious Liability Transcending the Limits of the Miller Act.

The prime contractor is the principal on the Miller Act payment bond and is obliged to exonerate its surety from liability thereunder and to indemnify and to reimburse the surety for all its loss and expense, including attorneys' fees, incurred by reason of the execution of that bond. Suretyship is not insurance. *Pearlman* v. *Reliance Insurance Co.*, 371 U.S. 132, 139, 140, footnote 19 (1962).

Furthermore, it is a matter of common knowledge that many small business contractors, in order to obtain bonding capacity necessary to bidding on and to obtaining awards of contracts on federal construction projects, need to have, in addition to the corporate indemnification of the surety, individual indemnitors of the surety, such as officers and stockholders of the company. See *Carroll* v. *National Surety Co.*, 58 App.

D.C. 3, 24 F. 2d 268 (1928); *Transamerica Insurance Co.* v. *Bloomfield*, 401 F. 2d 357 (CA6, 1968).

It is also a matter of public knowledge that there has been great emphasis on the awards of construction contracts to small businesses and the aggregate amount of such contracts on federal projects which permit a small business qualify for awards has escalated. The total volume of small business federal construction contracts is great. A loss to small business contractors, by extension of vicarious liability beyond the plain provisions of the Miller Act potentially bringing about double payment or long and expensive defensive litigation,[8] can impair working capital, work a loss of bonding capacity in whole or in part, and effectively put a small business contractor out of business.[9]

[8] *Cf. U.S.* v. *Monaco and Son, Inc.*, 336 F. 2d 636 (CA4, 1964).

[9] The one-year limitation in Section 2(b) of the Miller Act is for the benefit of the contractor, because its expiration marks the end of the contractor's liability. Thus, a contractor with but modest bonding capacity can bid on new projects because the expiration of the one-year period with no claims against the contractor restores or renews the bonding capacity.

CONCLUSION

The decisions and judgment below contravene the limitations pertaining to the class entitled to sue on the payment bond under Section 2(a) of the Miller Act and the authoritative decisions thereunder. Accordingly, it is urged that the judgment below be reversed.

Respectfully submitted,

KAHL K. SPRIGGS
1000 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorney for Amicus Curiae
The Associated General
Contractors of America

Of Counsel:
SPRIGGS, NICHOLSON & MYERS
1000 Sixteenth Street, N.W.
Washington, D.C. 20036

EXHIBIT

EXHIBIT

74TH CONGRESS

1st Session

HOUSE OF REPRESENTATIVES

REPORT No. 1263

Bonds of Contractors on Public Works

JUNE 19, 1935.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

MR. MILLER, from the Committee on the Judiciary, submitted the following

Report

[To accompany H.R. 8519]

The Committee on the Judiciary, having considered H.R. 8519, requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by an additional bond for the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work, reports the same favorably to the House with the recommendation that it do pass.

This proposed legislation supersedes the Heard Act, which it repeals, dealing with bonds of contractors on public works. After considerable complaint with regard to the working of the Heard Act had come to the Committee on the Judiciary, particularly from subcontractors who have experienced in many cases what seems to your committee to be undue delay, with resultant hardships, in the collec-

tion of moneys due them by suits on bonds under the procedure prescribed by the Heard Act, the committee appointed a subcommittee to consider all of a number of proposed amendments which had been introduced in the House and referred to the committee. Extensive hearings were held by the subcommittee, at which representatives of contractors, surety companies, and the Government were heard.

The Treasury Department expressed its accord with the purpose sought to be accomplished in the following language contained in a letter dated March 23, 1935, addressed by the Secretary to the chairman of the committee with regard to H. R. 2068, one of the bills considered by the subcommittee, and which is superseded by the reported bill, H. R. 8519:

The major purpose of the bill seems to be to afford greater protection to subcontractors, laborers, and materialmen by shortening the period within which action may be instituted by them against the surety. With this purpose the Treasury Department is fully in accord, as there have been many instances in which several years have elapsed after the performance of the work before a judicial remedy was available under the existing law.

Procedure With Existing Law

The Heard Act is set out in full at the end of this report in compliance with the Ramseyer rule. It will be observed that under this act, there is but one bond provided by the contractor, which serves as protection both for the United States and for subcontractors, material men, and laborers.

If suit is brought by the United States on the bond other claimants may intervene and have their claims adjudicated, subject to the priority of the United States. If, however, no suit is brought on the bond by the United States, the claimants must wait until 6 months after the completion and

final settlement of the contract before they may initiate suit. In the case of works requiring a long period of time to complete, this may mean a delay of years before the subcontractors, material men, and laborers are even permitted to bring suit on the bond, and months more of delay occur before judgment is entered. Under such circumstances it appears that claimants frequently find themselves under the necessity of choosing whether they will wait years for their money or accept compromises which, if they do not involve greater loss, at least destroy the profitableness of the contract. Those in financial stringency, of course, have no choice but the latter alternative.

Procedure Under H. R. 8519

Under this bill the contractor on all contracts of more than $2,000 will furnish two bonds:

(*a*) A performance bond satisfactory to the officer of the Government awarding the contract in such amount as he shall deem adequate for the protection of the United States; and

(*b*) A payment bond for the protection of all persons furnishing labor or material in the prosecution of the work provided for in such contract. The amount of the payment bond is determined by the amount of the contract, as follows:

Contract:	Bond
Not more than $1,000,000	One-half of amount of contract.
Between $1,000,000 and $5,000,000	40 percent of amount of contract.
Over $5,000,000	$2,500,000.

The right to sue on the payment bond and prosecute his action to judgment and execution accrues to any person

protected by the bond 90 days after the last of his labor was performed or material supplied if he has not been paid within that time. The suit must be brought in the district court of the district where the contract was to be performed and may not be commenced after the expiration of 1 year from the date of final settlement of the contract.

One protected by the bond must be vigilant in the prosecution of his rights thereunder or take the chance of finding the bond depleted by the executions of those more prompt than he, or perhaps find the door entirely closed against his suit by limitation. "Equity aids the vigilant."

A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond.

In compliance with clause 2a of rule XIII, existing law which it is proposed to repeal is set out in full below:

UNITED STATES CODE, TITLE 40, SECTION 270

Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials: Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public

building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claim and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided,* That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further,* That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto

within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further,* That in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.